***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

# 76-1022

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In The

# United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*vs.*

WILLIAM SANGEMINO,

*Defendant-Appellant.*

*On Appeal From the United States District Court for the Southern District of New York*

## APPELLANT'S APPENDIX

Volume II, pp. 351a - End

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the first try.

She says, "I realize that."

Is there any doubt that all this happened? That tape was made back in 1970 by Lemler before any problems with Lemler's business arose, without any reason, any motives to create an impression for you ladies and gentlemen. You heard that tape.

Petro eventually withdraws his request and goes overseas and serves his country and eventually comes back and is discharged. And that's the Petro case, ladies and gentlemen. And Lemler testified that Major Sangemino got his cut on that case also.

And the next case you heard about was Richard Falcoff, and here again you have Falcoff's Selective Service record. Richard Falcoff, a man who was in school in Louisville and took a physical and when he took the physical he told the draft board, and it is right in his record, you can look at it, "There is nothing wrong with me. I don't have epilepsy. I am in good health."

The doctor wrote on that report: "Denies serious illness." That is in March of 1971.

Comes home in June. His college deferment just ran out. He goes to Lemler. Lemler goes to Sangemino and a reexamination of Falcoff is set up, and in November,

'71, he takes his physical, he comes to the board with absolutely no letters, no medical evidence, but claims he has epilepsy and he gets a one month RBJ, which means, as you have heard through this trial, a reexamination believed justified in one month.

The interesting thing about this, ladies and gentlemen, is that that is November, 1971. It is not until April of the following year that Falcoff is placed in a reduced category and never served in the Army.

What happened? There was no reexamination after one month. He was never reexamined. Take a look at his record. Why wasn't he ever reexamined? The reason is due to the corrupt intervention of Sangemino in this case. You think they just forgot about Richard Falcoff? It said, "Reexamine in one month." That is November 16.

April, 1972, never examined, and they drop in category, reduced priority, and he never serves. Sangemino got his cut on this case, too.

Now, the last case, the case of Edward Resnick, and here there was a lot of testimony. You heard from Edward Resnick's mother. When you put it all together, the phone messages, Resnick's mother, Lemler, what do you have? Well, on August 19, Resnick's mother and Lemler

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money. She brought that envelope up. If she were going to create testimony she would tell you "I knew what the contents were." But she didn't know. She is a housewife. What motive does she have to come in here and lie to you? None. The defense has suggested no motive. They have suggested no motive because there just is no motive; there just is no motive. She took a sealed envelope from Lemler to Sangemino.

The third piece of corroboration: Joseph Petro. The defense this morning conceded to you that he was a truthful witness. What does he tell you? He went to the Pentagon with Lemler and saw a colonel, just like Lemler told you.

That Eisenhower jacket issue really has absolutely no significance. The question is, did Lemler and Petro go to the Pentagon and see a colonel? And Petro told you that they did, and they spent several hours cross-examining on that point, but Petro settled that dispute for you, ladies and gentlemen.

What else did Petro tell you? He told you that Lemler said to him that they were going to go through Major Sangemino in New York.

He also told you that he took a sealed envelope from Lemler and delivered it to Sangemino.

* * *

that case was in progress, and it's frankly remarkable the memory, to be able to place something that took place that long ago that close.

Also, the record in South Oaks for Josephine Petro: What do those records tell you? Those records tell you that on one of the occasions Lemler did pay an advance for Mrs. Zweibel, I think it is $1,100 -- you look at the record; that he did check in Janice Zweibel saying he was the uncle, just like he told you he did. That is the next piece of corroboration.

Then we have the testimony of Harriet Tollin.

Now, the defense tells you that you should believe Harriet Tollin about the cards, those white cards.

Lemler says the white cards went to Harriet Tollin. Harriet Tollin tells you she remembers white cards in the office; no question they existed, but that she didn't get that; the only thing she got from him was some personal cancelled checks. They want you to believe Harriet Tollin about that, and they tell you she is believable about that.

Well, Harriet Tollin is likewise believable that what else she testified; and what else she testified to is this: that in 1971 when Lemler was in full bloom, he came out of 26 Federal Plaza, got into the back of the limousine, and said, "Can you imagine, I had to go into

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the men's room to pay the major."

That is 1971. That's before Lemler was in any problem. He was in his full glory.

That, ladies and gentlemen, is from the same witness that the defense suggests to you is testifying truthfully about the cards. They can't have it both ways. They can't have it both ways. If she were tailoring her testimony she would come in here and tell you "I got the card and I destroyed it." But she doesn't recall getting the card, and that is what she told you.

Now, the defense also passes her off that she is coming in here trying to bolster her father.

Well, that's a pretty good argument in the ordinary course of events, but this is not the ordinary course of events.

What else did she testify? She testified that she testified against her father in Nassau County voluntarily. She wasn't subpoenaed; didn't have to be dragged in. She came in and testified for the prosecution in Nassau County which landed her father in jail.

She also testified she has absolutely no relationship with her father of any kind since the business folded. She is about the last person in this world who would be coming in here to help Nathan Lemler. She came in

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here to testify truthfully. She has absolutely no reason to lie, none has been suggested, and the defense and I completely agree as to the testimony of Harriet Tollin. She testified truthfully.

The next piece of corroboration, the sign-in logs: they show Lemler in 26 Federal Plaza.

The defense has made much that he is shown to be signed in four times, and there are a total of 31 books; but as it was demonstrated from the mouth of the defendant himself, that there are many periods in which only one book exists for, and he told you, he worked in that building, there were three entrances with two books each.

The government doesn't present these books as an existant record of the times that Lemler was there; but believe me, if we didn't have those books to show him there on those days the defense would be asking, "Where is the proof he ever entered the building?"

Those books are by way of illustration, by way of example. The government does not contend to you that they are every book and every sign-in, and the government does not contend to you that the federal guards are that careful that no one can get in without signing. Those books are presented as an illustration. They are the books that remain, the ones that still exist, to show that Nathan

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(Jury present.)

THE CLERK: The Court is about to charge the jury. Anybody wishing to leave will do now or wait until the completion of the Court's charge.

THE COURT: Mr. Bross and members of the jury:

We are now at that stage in the trial where you will soon undertake your final function as jurors, and here you perform one of the most sacred obligations of citizenship, and that is acting as ministers of justice. And you are each to discharge this final duty in an attitude of complete fairness and impartiality and, as was emphasized by me when you were first selected, without bias or prejudice for or against the Government or the defendant as parties to this controversy.

Let me state the fact that the Government is a party entitles it to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, individuals and Government alike, stand as equals before the bar of justice in this court.

Now, your final role here is to decide and pass upon the fact issues in the case. You are the sole and exclusive judges of the fact. You determine the weight of the evidence, you appraise and decide the credibility or

truthfulness of the witnesses, you draw the conclusions, the reasonable inferences from the evidence, and you resolve such conflicts as there may be in the evidence. I shall later discuss with you how you determine the credibility or truthfulness of the witnesses.

And my final function here is to instruct you as to the law, and it is your duty to accept my instructions as to the law and to apply them to the facts of the case as you may find them to be.

Now, you are not to consider any one instruction which I give you alone as stating the law, but you must consider all of my instructions taken together as a whole.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that the lawyers, either for the Government or the defendant, may have said with respect to matters in evidence, whether during the trial or in a question or in argument or in summations, is not to be substituted for your own recollection of the evidence. So, too, anything that I might say during the trial or anything that I might refer to during the course of these instructions as to any matter in evidence is not to be taken in place of your own recollection.

Questions are not evidence. The evidence is

the answer or the sworn testimony of the witness, and the questions are useful only to the extent that they permit you to understand the meaning and significance of the answers.

Now, the attorneys in any case not only have their right but it is their duty to make objections and to press whatever legal theories they may have, and they are simply performing their duty.

Any evidence as to which objection was sustained by the Court and any evidence ordered stricken out by the Court must be disregarded by you in its entirety.

And put out of your mind any exchanges which may have occurred during the trial between the lawyers or between any attorney and the Court.

It is not my function to favor one side or the other or to criticize anybody in any way whatsoever or to indicate to you, the jury, that I have in any way any opinion as to the credibility of any witness or as to the guilt of innocence of the defendant. That is your function. It is yours alone and I leave it entirely with you. So please don't assume that I hold any opinion in any matters concerning this case, and please don't reach any conclusion that I may have some attitude or that I may tend to favor one side or the other in the case. I do

not.

Now, of course, the indictment here itself is no evidence of the crimes charged. Instead, an indictment is merely the method or procedure under the law whereby persons accused of crimes by a grand jury are brought into court to have their guilt or innocence determined by trial juries such as yourselves, and, therefore, the indictment must be given no evidentiary value but shall be treated by you solely as an accusation. It is not evidence or proof of the defendant's guilt and no weight or significance whatsoever is to be given to the fact that an indictment has been returned against the defendant.

He has pleaded not guilty, and the Government thus has the burden of proving the charges beyond a reasonable doubt. A defendant does not have to prove his innocence. On the other hand, he is presumed to be innocent of the accusations contained in the indictment, and this presumption of innocence was in his favor at the start of the trial, as I believe I told you before, and the presumption of innocence continued in his favor throughout the entire trial and it is in his favor now and remains in his favor during the course of your deliberations in the jury room and the presumption of innocence is removed only if and when you, the jury, are satisfied that the Govern-

ment has sustained its burden of proving the guilt of a defendant beyond a reasonable doubt. Of course, unless you are so convinced you must find him not guilty.

Now, the question naturally comes up: What is a reasonable doubt? Well, members of the jury, these words almost define themselves. That is a doubt founded on reason arising out of the evidence in the case, or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is a doubt that appeals to your reason, to your common sense, to your judgment and to your human experience. It is not caprice or whim or speculation or conjecture or suspicion, and it is not an excuse to avoid the performance of an unpleasant duty and it is not sympathy for a defendant.

If, after a fair and impartial consideration of all of the evidence, you can candidly and honestly say you are not satisfied of the guilt of a defendant, that you do not have an abiding conviction of a defendant's guilt of the particular charge, in sum, if you have such a doubt as would cause you, as prudent persons, to hesitate before acting in matters of importance to yourselves, then you have a reasonable doubt and in that circumstance it is your duty to acquit.

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On the other hand, if, after such an impartial and fair consideration of all the evidence, you can candidly and honestly say you do have an abiding conviction of a defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters of the personal affairs of your own life, then you have no reasonable doubt and under those circumstances it is your duty to convict.

Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few men, however guilty they might be, would ever be convicted because it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible to mathematical certainty, and for that reason the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Now, in the indictment there are three counts for you to consider and they are called Count 1, Count 2 and Count 3. Each count is a separate crime and each must be considered separately, and you will be asked to state a separate verdict on each of the three counts.

William Sangemino is the only defendant on trial

before you and he is the only person whose case you will be asked to decide in your verdict. As I will explain to you shortly, in considering his guilt or innocence you may have to determine the nature of the participation or activities, if any, of Nathan Lemler, Edward Resnick, Leonora Resnick, Dr. Myron Teitelbaum, David Blank, Pat and Josephine, Petro or others.

In the determination of innocence or guilt, you must bear in mind that guilt is personal. The guilt or innocence of the defendant on trial before you must be determined with respect to him solely on the evidence presented against him or the lack of evidence. The case of a defendant stands or falls upon the proof or the lack of proof of the charge against him and not against somebody else.

Now, for your guidance In considering the evidence you have heard, I must tell you that there are two classes of evidence recognized and admitted in courts of justice, upon either of which the jurors may find an accused guilty of a crime. One type of evidence is called direct evidence and the other is called circumstantial evidence.

Direct evidence tends to show the fact in issue without the need for any other amplification, although, of

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course, there is always the question as to whether it is to be believed.

Circumstantial evidence is evidence that tends to show facts from which the fact in issue may reasonably be inferred. It is evidence that tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer or conclude that the facts sought to be established are true.

There is a traditional example. I will give it to you very briefly. Sometimes it is difficult to tell merely by looking out the window whether it's raining outside or not, but, if you look out and you see people passing in the street have their umbrellas up, you will usually come to the conclusion that it is raining. You have direct evidence, the evidence of your own senses, your eyes, that tell you the umbrellas are up, and that constitutes circumstantial evidence from which you are entitled to conclude that it must be raining.

In other words, circumstantial evidence consists of facts proved from which the jury may infer by a process of reasoning, by thinking, the existence of other facts in issue, and circumstantial evidence, if believed, is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of a

defendant before he may be convicted of any crime.

However, I caution you that it is your duty to decide this case on the basis of the evidence presented in court, both the direct and circumstantial evidence, or the lack of evidence, and you are to decide on the basis of the testimony of the witnesses which you believe and the documents or exhibits in evidence and the inferences that reasonably flow therefrom. You are not to decide this case on the basis of speculation or conjecture or guesswork.

In determining what evidence you will accept as true, you must make your own evaluation of the testimony given by each of the witnesses and determine what you believe to be the truth and the degree of weight you choose to give to that testimony

The testimony of a witness may fail to conform to the facts as they occurred because the witness is intentionally telling a falsehood or because the witness did not accurately see or hear what he testified about or because his recollection of the event is faulty or because he hasn't expressed himself clearly in giving testimony.

There is no magic formula by which you can evaluate testimony. You bring to this courtroom today all of your experience and the background of your lives.

In your every-day affairs, each of you determine for yourselves the reliability of statements made to you by others, and the same tests you use in your every-day life are the tests which you apply in your deliberations.

You may, of course, consider the interest or lack of interest of any witness in the outcome of the case. A witness who is interested in the outcome of a case is not necessarily unworthy of belief. The interest of a witness, however, is a factor or a possible motive which you may consider in determining the weight and credibility to be given to his testimony.

In doing this, you may also consider whether the testimony of a witness is corroborated or borne out by the testimony of others or by documentary evidence or by exhibits.

You may consider the bias or prejudice of a witness, if there be any, and the manner in which the witness gives his or her testimony on the stand, the appearance and conduct of the witness in giving testimony, the demeanor, the opportunity the witness had to observe the facts concerning which he or she testifies, and the probability or improbability of the testimony in the light of all of the other events in the case.

You may also consider whether a witness had any

motive to lie. These are all items to be taken into your consideration in determining truthfulness and weight, if any, which you, the jury, will assign to that witness' testimony.

You may consider the effect, if any, of prior inconsistent statements or prior inconsistent testimony which a witness may have given, and I believe I had permitted on at least one occasion evidence of a prior consistent statement as to a witness, and that also you may consider in determining the weight or credibility of the testimony.

But prior consistent statements are not taken for the truth thereof but merely to assist you in determining credibility.

Now, if all the considerations I have mentioned make it appear that there is a discrepancy in the evidence, you will have to consider whether this can be reconciled by fitting conflicting testimony together, and if that's not possible, then you will have to determine which of the two conflicting versions you will accept as true.

Now, if you find that any witness has wilfully testified falsely as to a material fact on this trial, you may, but you need not, disregard the entire testimony of that witness on the principle that one who testifies falsely

about one material fact may testify falsely about everything. But you are not required to consider such a witness as totally unworthy of belief. You may accept so much of his testimony as you deem true and disregard that which you believe is false. You, the jury, as sole judges of the facts, determine which ofthe witnesses you will believe, what portion of their testimony you will accept as true and what weight or significance you will give to it.

Now a word about accomplices. In the prosecution of crime, the Government is often called upon to use witnesses who are accomplices in the commission of the crime itself. This is particularly so in cases of conspiracy charges. Conspirators do not publicly proclaim their intentions to operate, and it often happens that only members of the conspiracy have evidence which is relevant to and important in the case.

Now, Lemler is, on the Government's theory of this case, an accomplice. Experience has shown that accomplices may be motivated to place the responsibility on others than themselves. Accordingly, an accomplice's testimony should be closely examined, weighed with care, and checked with the facts which you find to exist in this case and against the evidence which may corroborate them,

and then you should give the testimony such value or weight as you deem appropriate under the circumstances.

In the Federal Courts, accomplice testimony by itself, even if not corroborated, may be sufficient to convict, but only if it convinces you beyond a reasonable doubt.

In this case, the Government contends that the testimony of Lemler is corroborated by the testimony of others, including the witness Mofschowitz, and by certain of the documentary exhibits and by tapes.

Now, the weight or significance of any testimony or evidence is entirely a matter for the consideration of the jury. However, the testimony of an accomplice such as Lemler is not to be rejected unless the jury thinks it is entitled to no weight. Rather, it is to be taken and dealt with and considered by the jury the same as any other evidence in the case, for you are the triers of the fact and you determine the weight and significance of testimony and decide the inferences which should be drawn therefrom.

Naturally, if accomplices could not be used there are many cases where there is real guilt where conviction otherwise would be not obtainable, but, as I mentioned to you earlier, the testimony of an accomplice

must be received with caution and weighed with care.

Now, the law permits a defendant in a criminal case upon his request to testify in his own behalf. The testimony of the defendant is before you and you must determine how far it is credible. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony.

You are instructed that interest may create a motive for false testimony and that the greater the interest the stronger the temptation and that the interest of a defendant is of a character possessed by no other witness and is therefore a matter which may affect the credance which should be placed on that testimony. However, that is also a matter entirely for you to determine, using your own common sense and considering all of the evidence in the case.

Now, admissions of a defendant are among the most effectual proofs in law. They constitute the strongest sort of evidence against a party making the admissions of the facts stated in the admissions, and you are entitled to give weight to the defendant's admissions in this case, whether made on the stand while testifying before you or made in a tape recording or made in any

conversation with a witness whose version of the conversation you believe as truth of the facts which you find that he has admitted voluntarily and knowledgeably either on the stand before you while he was testifying or in conversations which you may find that he had with other witnesses and which the other witnesses in your opinion have truthfully reported to you or which he has said in conversations appearing on tape.

Now a word about the reputation for good character. There is testimony here regarding the previous excellent character of this defendant. Good character is to be weighed as a factor in a defendant's favor, and you should consider it together with all the facts and other circumstances before you and then give it the weight to which you think it is entitled. A defendant's reputation for good character may, like other factors in his favor, generate a reasonable doubt as to his guilt.

On the other hand, if on all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that he previously enjoyed a reputation for excellent character does not justify or excuse the crime and you should not acquit a defendant merely because you believe that the defendant is a person of good reputation if you are otherwise satisfied beyond a reason-

able doubt as to his guilt.

Furthermore, the testimony of a character witness is not to be regarded by you as expressing the witness' personal opinion of the defendant's character or reputation, nor is it to be taken by you as the witness' opinion as to the guilt or innocence of the defendant of these particular charges. The guilt or innocence of a defendant is for you and for you alone to determine.

Now, you will recall that a tape recording of a meeting between the defendant and Lemler was received in evidence as Government's Exhibit 8 and a transcript of that tape recording was received as Government's Exhibit 9. Also a tape of a conversation between Mrs. Petro and Lemler was received in evidence in the same way as Exhibits 14 and 15, together with the transcript.

Now, these taped conversations were each made with the consent of one of the parties to the conversation. They are not a wiretap or a bug and no Court order was necessary prior to makeing that type of a recording.

The weight and significance of each of these tapes, as is true of the weight and the value of all other evidence in the case, is a matter for you to consider and resolve in your judgment. It is for you to decide, as you listened what words were said, who said them, with

what inflections and what expressions and with what meaning when you listened, and you will do this in the context of the entire conversation and all of the circumstances preceding and following them.

If you want any tape played again for you in the course of your deliberations, the foreman will please send a note out by delivering it to the marshal asking that any such tape or both tapes be played, if that is the wish of the jury.

Now remember, I gave you cautionary instructions about the typewritten transcripts that were shown to you at the time the tapes were played. These transcripts have only one purpose, and that is to aid you in following and listening to the conversations on the recordings. It has no other purpose and the transcript of a tape is not in itself evidence. It is just an aid to help you listen to, hear and understand the tapes.

Now, there is no duty in any case on the part of the Government to call in witnesses whose testimony would be merely cumulative. You are to decide the case on the evidence which is before you or the lack of evidence and not upon evidence which might have been brought before you.

Specifically, I instruct you that the Government

had no duty to call Dr. Myron Teitelbaum or George Weiss or Richard Falcoff as witnesses.

As I explained to you earlier, the defendant has no obligation or duty to call any witnesses or bring in any evidence. However, Teitelbaum, Weiss and Falcoff were equally available to both sides and they could have been subpoenaed by the Government or by the defendant if either of them thought they should do so and located those persons and supoenaed them, and, accordingly, no inference follows adverse to anyone, either adverse to the Government or the defendant, from any failure to call them as witnesses or to call any other witnesses whom you would consider to be merely cumulative.

Similarly, the other tapes of conversations between Nathan Lemler and the defendant which have been mentioned were known to exist by both the Government and the defendant, and either side could have subpoenaed the tapes and introduced them in evidence.

I instructed you previously, and I will say it again, you decide this case on the basis of the evidence presented and not upon conjecture or guesswork as to what evidence might have been produced or might have been shown which is not before you.

I will take up the matter of the indictment at

this time. The indictment contains three counts and each count charges a separate crime, and while there may be facts common to all of them, as I mentioned earlier you must consider and decide each count separately.

Essentially, Count 1 of this indictment charges that William Sangemino, together with Nathan Lemler and others, formed a conspiracy or criminal agreement to help young men eligible for the draft to avoid having to serve in the Armed Forces of the United States and to help members of the United States Army to secure hardship discharges or compassionate transfers to stateside duty to avoid service in Vietnam in return for money.

The indictment also charges that the United States was defrauded of the honest services of these draftees and soldiers as well as the honest services of the defendant himself.

Now, with respect to Count 1, which charges the conspiracy, a conspiracy to commit a crime is a separate offense, distinct and apart from the substantive crimes the conspiracy was formed to accomplish. Thus, the crime of conspiracy to defraud the United States is different from the substantive crime of bribery even though many of the same facts may relate to both crimes.

Conspiracy focuses on the danger to the public

of an agreement or plan to violate the law, whereas the substantive crime mentioned in Count 2 focuses on the carrying out of that agreement.

Now, Section 371 of Title 18 of the United States Code, which makes conspiracy a crime, reads in pertinent part as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, those persons will have committed a crime.

Now, Count 1 charges that the defendant William Sangemino, along with Nathan Lemler, Marilyn Blicksilver, Myron R. Teitelbaum, Edward J. Resnick, Leonora Resnick, Joseph Petro, Pat Petro, Gerald Weiss, David Blank, Janice Zweibel, David Zweibel, Henry J. Wuerz, Jr., Richard Falcoff, Dorothy Paley, and James Whelan, who are named as conspirators but not as defendants in this case, conspired to defraud the United States.

Now, there was no evidence presented as to Wuerz, Paley or Whelan, so you will disregard those names and treat them just as if they were not listed there.

Specifically, the indictment charges that these

individuals conspired to defraud the United States in connection with the performance of its lawful governmental functions by interfering with the proper functioning of the Selective System. This count charges that the defendant and others conspired to impair the Selective Service System from having its lawful affairs conducted fairly, honestly and impartially, that they conspired to deprive the Selective Service System of the full, faithful and honest services of men eligible for the draft and that they conspired to deprive the United States Army of the full and faithful services of men in the service and that they conspired to deprive the Selective Service System of the impartial and honest services of Major William Sangemino uninfluenced by the exertion of dishonest pressure in the form of bribes.

The indictment charges or alleges the manner in which the defendant and alleged co-conspirators carried out the unlawful agreement. I will read Subparagraph 4 of it as follows:

"Among the means by which the defendant and his co-conspirators would carry out their agreed upon unlawful purposes were the following:

"(a) Co-conspirator Nathan Lemler would and did solicit clients who wanted to enter graduate

schools in medicine, law, dentistry or other disciplines.

"(b) Many of these clients were eligible to be drafted into the Armed Forces of the United States. Lemler would and did exact fees from these clients ranging from $2500 to $30,000 to place them in graduate school and/or to have them avoid service in the Armed Forces of the United States.

"(c) After interviewing said clients Lemler would and did contact the defendant William Sangemino and tell him of the client. Lemler and Sangemino would and did then agree on the best method to follow to have the client avoid service.

"(d) One such method used by Lemler and Sangemino was to have the client fail to qualify physically for service. Sangemino would and did provide Lemler with his business card to give to the client. The client would and did then present the business card to certain persons at the Armed Forces examining station and would thereafter fail his physical examination.

"(e) In other cases Sangemino and Lemler would and did agree to have a client disqualified due to psychiatric problems. Lemler would then contact

co-conspirator Dr. Myron Teitelbaum. Dr. Teitelbaum would examine the client, sometimes seeing him only once or twice, and then would write a letter stating that the client was mentally unsuited for service in the Armed Forces.

"(f) In cases where the client was already in the Armed Forces Sangemino and Lemler would and did secure fraudulent hardship discharges or transfers. Pursuant to agreement a dependent or close family member of the client was taken to South Oaks Mental Hospital for short periods of time from approximately six days to fourteen days. Thereafter documentation would be prepared and presented to the United States Army for either transfers or discharges.

"(g) Co-conspirator Nathan Lemler would and did pay a total of approximately $50,000 to the defendant William Sangemino in return for the defendant's advice and assistance, as described above, in having said clients avoid or terminate service in the Armed Forces of the United States."

Now, that's the end of that particular portion of Count 1 of the indictment.

In order to convict this defendant under Count 1, you must find that each of the following three elements

have been proven beyond a reasonable doubt. These are the three elements of Count 1 which I am giving you now. As I just said to you, the defendant may not be convicted on Count 1 unless the Government has proved each of these elements beyond a reasonable doubt.

First, that the conspiracy charged in Count 1 did in fact exist, that is, that two or more persons agreed to defraud the United States at some point at or about the time period alleged in the indictment, which is from January 1, 1968, to July 1, 1972.

Second, that the defendant knowingly and wilfully associated himself with the conspiracy.

Third, that at least one of the co-conspirators committed in this District, the Southern District of New York, at least one of the overt acts set forth in the indictment.

If the Government fails to establish each essential element of Count 1 to your satisfaction beyond a reasonable doubt, you must acquit the defendant on this conspiracy count, that is, Count 1. If the Government succeeds in proving all three elements according to the standards just mentioned, your duty is to convict him on this count.

Now about the first element. The first element of Count 1 which you must determine is whether the conspiracy

charged in the indictment existed.

Now, what is a conspiracy? Well, for our purposes in this case, a conspiracy is simply a combination or an agreement or an understanding reached by two or more persons to commit a crime. Thus, a conspiracy is a kind of partnership for criminal purposes in which each member becomes the agent of every other member and they work together to achieve a common result.

The gist of the crime of conspiracy is a combination or agreement to violate the law. This does not mean that two or more persons must meet and sign a solemn compact of some kind, nor does it mean that they must sit down and agree in so many words on what their unlawful scheme is to be or on how they are going to carry it out. When persons enter into a combination or an agreement to violate the law, much is left to implicit and tacit understandings. Conspirators don't loudly proclaim their plans or make public their purposes.

It is sufficient if two or more persons in any manner, through any contrivance, implied or tacitly, come to a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

Nor is it required that you find that all of the

co-conspirators alleged in the indictment joined in the conspiracy in order to find that the conspiracy existed. You need only find that one of the alleged conspirators entered into an unlawful agreement with one or more other persons in order to find that the conspiracy existed.

A conspiracy requires at least two persons who have conspired together for the criminal purpose being considered.

Now, in determining whether there has been such an unlawful agreement, you may judge acts and conduct of the alleged members of the conspiracy which are done to carry out an apparent criminal purpose. The old saying, actions speak louder than words, is applicable here.

Usually the only evidence available is that of disconnected acts on the part of the alleged individual conspirators which acts however, taken together in connection with each other and with the reasonable inferences flowing from such acts, show a conspiracy or agreement to secure a particular result just as satisfactorily and conclusively as more direct proof.

Now, the crime of conspiracy is complete when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the co-conspirators.

Proof concerning the accomplishment of the objects of a conspiracy may be the most persuasive evidence of the existence of the conspiracy itself. Success of the venture if you believe it was successful, may be the best proof of the existence of the conspiracy.

In determining whether the conspiracy charged in this indictment actually existed, you may consider the evidence of the acts and conduct of the alleged conspirators as a whole and the reasonable inferences to be drawn from such evidence. If, upon consideration of the evidence, you find beyond a reasonable doubt the minds of at least two of the alleged co-conspirators met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme charged in the indictment, then proof of the existence of the conspiracy is complete.

Now, I have just defined conspiracy for you. In this case the claimed object of the conspiracy was to defraud the United States. The indictment charges that the defendant and co-conspirators agreed to defraud the United States by obstructing and hindering and impairing certain agencies of the United States in the performance of their lawful governmental functions. The manner in which this was allegedly agreed upon can be divided probably

into four parts. I now read that portion of the indictment in Count 1 relating to the objects.

"It was a part of said conspiracy to defraud that the defendant and his co-conspirators would and did agree to defraud the United States of its lawful rights:

"(a) to have the business affairs of the Selective Service System conducted fairly, impartially and honestly without illegal collusion between an employee of the Selective Service System and persons subject to call under said system and other persons;

"(b) to have the full and faithful services of men eligible for service in the Armed Forces of the United States;

"(c) to have the full and faithful services of members of the Armed Forces of the United States;

"(d) to have the defendant William Sangemino free to perform properly, impartially and honestly his official functions unhindered and uninfluenced by the exertion on him of dishonest, unlawful and undue proessure and unhindered and uninfluenced by the offer and payment to him of any gratuities, bribes or other things of value."

I will explain to you the meaning of the word "defraud" used in the context of this case when I used the expression "defraud the United States."

The concept of defrauding in this context is somewhat special and particular. It is not essential to the theory of the indictment before you that a conspiracy to defraud the United States be designed to cause financial loss of some kind to the Government. The gist of the conspiracy is a combination or agreement that is designed to impair, obstruct or defeat the lawful functioning of any department or agency of the Government. So there need not be any cheating in the sense of obtaining money or property from the Government. Although actual fraud in that sense is not essential to this kind of charge, a conspiracy of this kind must, in order to constitute a crime, have as central features qualities of misrepresentation, of deceit, of chicanery or of overreaching of those charged with carrying out governmental duties.

For example, since it is a fairly common practice for members of the Selectice Service System to speak to registrants regarding their cases and to make determinations as to who is eligible to be drafted, the public has every right to assume that a person is not being privately paid for such services and, therefore, his advice

is the disinterested act of an honest and concerned public servant. Therefore, if an officer in the Selective Service System is paid money by a private person such as Lemler for the performance of an official act such as giving advice or assisting a registrant or looking after his problems, that in itself constitues a fraud on the Selective Service System and, therefore, on the United States.

The Government has a right to have its business and affairs carried on honestly and impartially, free from fraud, improper and undue influence, dishonesty or unlawful impairment or obstruction, and to have its officers and employees perform their lawful functions free from any fraud, improper or undue influence, dishonesty or unlawful impairment or obstruction, and, accordingly, if you find in this case beyond a reasonable doubt that the alleged conspiracy existed and that it had as a purpose to interfere with or obstruct any of the Federal Government's lawful governmental functions by deceit, graft or trickery or by means that were dishonest, then you would be permitted to conclude that an object of this conspiracy was to defraud the United States within the meaning of the law which I have just read to you.

Now, in this regard, I instruct you that the Selective Service System and the United States Military

Services are agencies of the United States within the meaning of the statute.

I also charge you that the administration of the laws under which men are selected to serve in the Armed Forces of the United States is a lawful function of the Selective Service System, that the defense of the United States is a lawful function of the United States Army, and if you find beyond a reasonable doubt that any two persons agreed togethet to impair the governmental functions I have just described, even if those plans to defraud were unsuccessful, the Government has satisfied its burden of establishing the agreement charged in Count 1.

Now, if you find the conspiracy existed, it is not required that the Government prove all the means alleged in the indictment to further it were in fact brought into play. If you find that one or more of the means were used to achieve the objective, that would be sufficient.

The period of time charged, as you heard before, is from on or about January 1, 1968, to July 1, 1972. It is not not necessary for the Government to prove the conspiracy started and ended on those specific days. It is sufficient if you find that a conspiracy was formed, that it existed for some substantial time within the period set forth in the indictment and that at least one overt act

was committed during that period.

Now, if you do decide that a conspiracy as charged existed, you must next determine whether the defendant William Sangemino was a member of the conspiracy, that is, whether he participated intentionally in the conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives.

To find that the defendant was a member of the conspiracy, you must find that he knowingly and intentionally participated therein. Thus, mere knowledge by the defendant of the existence of the conspiracy or mere knowledge of any illegal act on the part of an alleged conspirator such as Lemler or Teitelbaum, or mere association with one or more of the conspirators is not sufficient to establish his membership in the conspiracy. The Government must establish beyond a reasonable doubt that the defendant Sangemino was aware of the conspiracy's basic purposes and objects and that he entered into the conspiracy with a specific criminal intent, that is, with a purpose to violate the law.

So, if the defendant, with understanding of the unlawful character of the conspiracy, intentionally engages in actions or advises or assists for the purpose of furthering the illegal undertaking, he thereby becomes a knowing

and wilful participant and a conspirator.

Before a person can be found to be a conspirator, however, he must knowingly join in the venture. He must promote it or have a stake in its outcome. In the vernacular, he must be in on the scheme, part of the plan.

Now, knowledge is a matter of inference from facts pro[illegible] It is not necessary that the defendant be fully informed as to all the details of the scope of the conspiracy. In order to justify an inference of knowledge, a defendant need not know the full extent of the conspiracy and all of its activities and actors.

I want to caution you again that mere association with one or more of the conspirators does not make one a member of a conspiracy. Nor is knowledge without participation sufficient. What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with intent to aid the conspiracy in the accomplishment of those unlawful ends.

Once you find the conspiracy to exist and the defendant to have knowingly participated in it, the extent of his participation has no bearing on his guilt or innocence. The guilt of a conspirator is not measured by the extent or the duration of his participation. Even if he participated in a degree more limited than that of the other

co-conspirators, he is equally guilty so long as he was in fact a co-conspirator.

As I mentioned earlier, when people enter into a conspiracy to accomplish an unlawful end, they become agents for one another in carrying out the conspiracy. So the acts or declarations of one person made during and in furtherance of the conspiracy are deemed to be the acts of all and all are responsible for such acts.

It is important to note that this agency principle applies only to acts done and declarations made during the continuance of the conspiracy and in furtherance thereof. Thus, if you find, in accordance with these instructions, that a conspiracy did exist and that the defendant participated in it, along with others, then you may consider the acts performed and the statements made by others to carry out the conspiracy as evidence against this defendant even though he himself may not have been present or may not have had knowledge of any such acts or statements.

Now, you will recall that there is some testimony as to conversations by Nathan Lemler with his employees or his clients or with their parents which I permitted you to receive although the defendant was not present at those conversations. Now, ordinarily such testimoney would not be permitted under what is generally referred

to as the hearsay rule. There is an exception to the hearsay rule which applies in this case as to matters which did not take place in the presence of the defendant.

The Government contends that Nathan Lemler and the defendant on trial and others were involved in an illicit or illegal enterprise and had a common purpose which was to defraud the United States in the operation of the Selective Service System; in plain language, to act jointly in helping paying clients avoid their military obligations.

Now, under the circumstances of this case, if you find that such a conspiracy or joint criminal enterprise existed and that the defendant and Lemler and any of his clients or parents of clients or employees of Lemler were members of that conspiracy, you may treat Lemler and his clients or parents of clients or employees as the agents of the defendant, and their acts, statements and conduct in furtherance of the affairs of the illicit enterprise and during its existence may be treated by you as the acts of the defendant William Sangemino.

Now I will come to the third element of Count 1, the requitement of an overt act.

As I have already mentioned, an essential element of the crime of conspiracy is that at least one overt act to carry out the object of the conspiracy be

committed by at least one of the co-conspirators.

An overt act is any step, action or conduct which is taken to achieve or further the objectives of the conspiracy. The overt acts charged are as follows:

"In furtherance of, and to effect the objects of the conspiracy, certain overt acts were committed by the defendant and his co-conspirators in the Southern District of New York, including the following:

"1. During the summer of 1969 co-conspirator Nathan Lemler paid the defendant William Sangemino approximately $1000 at 26 Federal Plaza, New York, New York.

"2. On or about July 7th or 8th, 1969 co-conspirator Nathan Lemler paid the defendant William Sangemino approximately $800 at 26 Federal Plaza, New York, New York.

"3. In or about the last week of September, 1969 or the first week of October, 1969 co-conspirator Nathan Lemler paid the defendant William Sangemino approximately $2500 at 26 Federal Plaza, New York, New York.

"4. On or about October 21, 1970, co-conspirator Nathan Lemler entered 26 Federal Plaza, New York, New

York.

"5. In or about December, 1970 and January, 1971 co-conspirator Nathan Lemler paid the defendant William Sangemino approximately $1500 at 26 Federal Plaza, New York, New York in two payments.

"6. On or about January 26, 1971 the defendant William Sangemino telephoned co-conspirator Nathan Lemler.

"7. On or about February 24, 1971 the defendant William Sangemino telephoned co-conspirator Nathan Lemler in regard to co-conspirator Edward Rosnick.

"8. On or about March 31, 1971, co-conspirator Nathan Lemler entered 26 Federal Plaza, New York, New York.

"9. On or about May 11, 1971, the defendant William Sangemino telephoned co-conspirator Nathan Lemler.

"10. On or about June 15, 1971 Charles Mofschowitz entered 26 Federal Plaza, New York, New York.

"11. On or about July 20, 1971 the defendant William Sangemino telephoned co-conspirator Nathan Lemler.

"12. On or about October 20, 1971 co-conspirators

Marilyn Blicksilver and Nathan Lemler entered 26 Federal Plaza, New York, New York.

"13. On or about December 3, 1971 co-conspirator Nathan Lemler entered 26 Federal Plaza, New York, New York.

"14. On or about December 20, 1971 the defendant William Sangemino telephoned co-conspirator Nathan Lemler."

Those are the claimed overt acts in this case.

Now, an overt act need be neither a criminal act nor the crime which is the object of the conspiracy. Obviously, for people to enter public buildings or talk on the telephone is not in and of itself criminal conduct, but when, as the Government charges, and if you so find, the purpose of that activity was to accomplish a fraud on the Government, then those activities lose their innocent character and become overt acts to further the purpose of an illegal enterprise.

The reason the law of conspiracy requires an overt act is because two or more persons might agree to commit a crime against the United States and then change their minds and do nothing. In such a case, there is no crime, it is just talk, but if there is an agreement and that agreement is followed by an overt act committed in

furtherance of the agreement or to help perform the purposes of the conspiracy, then the agreement becomes the crime of conspiracy.

It is not necessary for the Government to prove that each member of the conspiracy committed or participated in the particular overt act, since the overt act of any one done in furtherance of the conspiracy becomes the overt act of all the other members. Any one member's act becomes the overt act of all the other members.

And so, too, the Government is not required to prove each of the overt acts. It is sufficient if it proved the commission of at least one of the acts at or about the time alleged.

Now, in addition, as I mentioned to you earlier, the Government must prove that at least one overt act was committed in the Southern District of New York, and I charge you that if you find that any of the overt acts occurred at 26 Federal Plaza or elsewhere in Manhattan, that act occurred within the Southern District ofNew York. Long Island is not within the Southern District of New York. Neither is Brooklyn nor Queens.

Now I will read Count 2 of the indictment. Count 2 of the indictment charges the defendant with soliciting and received bribes, and it reads as follows:

"The Grand Jury further charges:

"From on or about October 1, 1969 up to and including July 31, 1972, in the Southern District of New York, William Sangemino, the defendant, being a public official of the United States, to wit, a Major in the United States Army assigned to the Selective Service System, unlawfully, wilfully and knowingly did, directly and indirectly, corruptly ask, demand, exact, solicit, seek, accept, receive and agree to receive things of value, to wit, approximately $30,000, for himself and for other persons in return for: (a) being influenced in his performance of official acts; (b) being influenced to commit and aid in committing, and to collude in, and allow, a fraud, and make opportunity for the commission of a fraud, on the United States; and (c) being induced to do and omit to do acts in violation of his official duties, to wit, in return for providing advice and for assisting certain persons to avoid or terminate service in the Armed Forces of the United States."

Now, this Count 2 alleges a violation of Section 201(c) of the United States Code, which provides as follows:

"Whoever, being a public official or person selected to be a public official, directly or indirectly corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for:

"(1) being influenced in his performance of any official act; or (2) being influenced to commit or aid in committing or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

"(3) being induced to do or omit to do any act in violation of his official duty"

commits the crime of bribery.

Now, the bribery statute makes criminal the corruption of official positions through misuse of influence in governmental decision making. The essence of the crime of bribery is that the will of an interested person is substituted for the judgment of a public official as the controlling factor in official decisions.

Count 2 must be considered separately from Count 1. You must reach a separate verdict on Count 2, and before you can convict the defendant on Count 2 you must be satisfied that the Government has established the

following three elements beyond a reasonable doubt.

Now, you will recall I gave you the three elements on Count 1. Now I am about to give you the three essential elements of Count 2.

First, that during the period alleged in the indictment the defendant William Sangemino was a public official of the United States, namely, an officer in the United States Army and assigned to the Selective Service System.

Second, that the defendant Sangemino either directly or indirectly asked, solicited, sought, accepted, received or agreed to receive something of value for himself.

Third, that the defendant Sangemino did any or all of the above acts wilfully, knowingly and corruptly and with the specific intent to be influenced in the performance of an official act or induced to violate his official duty or to participate in or allow a fraud on the United States.

Now, as to the first element, there is no dispute here that at the time of the acts alleged in this indictment William Sangemino was an officer in the United States Army and assigned to Selective Service headquarters, 26 Fedwral Plaza in Manhattan, and I therefore charge you as

a matter of law that as such the defendant William Sangemino was a public official within the meaning of the statute which I have just read to you.

Now, to establish the second element of the crime of bribery, the Government must prove to your satisfaction beyond a reasonable doubt that the defendant William Sangemino directly or indirectly asked, solicited, sought, accepted, received or agreed to receive something of value for himself or for another person or entity.

First, it is not necessary that the defendant did all of these acts just mentioned. It is sufficient if he did any one of them. This element would be satisfied if the defendant simply received money. It is not necessary for the Government to prove that Sangemino actually solicited any money or that he asked for any money. The Government satisfies its obligation as to this element if it establishes that the defendant did any one of the acts required to be proved. Proof of one of them is sufficient.

Now, the term "something of value" includes money paid in any form.

The use of "directly or indirectly" is also significant and means it is not necessary for the Government to prove that the defendant himself asked for the money or even that he received the money.

Applied to the facts of this case, the Government contends that it satisfied its burden on this element by establishing beyond a reasonable doubt that Sangemino directly or indirectly asked for or received or agreed to receive money, and it is clear to you, I am sure, that the defendant denies the receipt of any money, and that is an essential issue in this case for you, the jurors, to decide.

Now, it is not necessary for the Government to prove that the defendant received the exact sum of $30,000. It would be sufficient for purposes of Count 2, if the Government proves beyond a reasonable doubt, that this defendant received any amount of money which was sufficient to be regarded by the parties giving and receiving it as something of value intended to influence the man in the performance of his official duties.

If the jury finds beyond a reasonable doubt that Lemler paid the defendant Sangemino the sum of $300, which is claimed to have been contained in the envelope said to have been delivered by Mr. Mofschowitz, Lemler's chauffeur, and handed to the defendant by Mofschowitz, then even that relatively small amount of money is sufficient to be found to be a bribe by the jury if the jury finds that the parties so regarded it.

Now, the crime of bribery requires specific

intent, intent on the part of the giver and intent on the part of the receiver, each to commit the criminal act of bribery.

Now, the third element involves proof of the defendant's state of mind, that is, that the defendant acted knowingly and wilfully and, in the case of this statute, corruptly, that is, for a bad motive, in return for at least one of the following:

(1) being influenced in the performance of his official acts; or

(2) being influenced to participate or allow any fraud on the United States; or

(3) being induced to do or to omit to do any act in violation of his official duty.

It is not necessary to prove that the defendant received money in return for all three of these reasons. It is sufficient if he did so in return for any one of the aforementioned three reasons.

For purposes of the bribery statute, an official act means any decision or action or any question, matter, cause, suit, proceeding or controversy which may at any time be pending or which may by law be brought before any public official in his official capacity or in his place of trust for profit.

The exertion of the influence inherent in or associated with a public office is an official act. It is the corruption of official positions through misuse of influence in governmental decision making which the bribery statute makes criminal.

Thus, if you find that the defendant exerted influence on persons at the Armed Forces examination station or local draft boards, such influence enhanced as it was by reason of his position as an officer of the Selective Service System comes within the purview of the criminal statutes when it is exerted in exchange for the payment of money. Therefore, if you find that the defendant, as an officer of the Selective Service System and a major in the United States Army, used his official position to intercede with or to influence the actions of others employed by Selective Service or other federal agencies, such as the Army, then he has performed an official act or duty within the meaning of the bribery statute.

Also, the term "fraud on the United States" has the same meaning in Count 2 as I previously explained to you in connection with Count 1, that is, essentially to deny the United States the right to have its business affairs carried on honestly and impartially, free from fraud, improper and undue influence, dishonesty or unlawful impair-

ment or obstruction.

Once again, it is not necessary that the fraud succeed. In the context of this case, it is not necessary that Lemler's clients avoided or terminated service in the Armed Forces of the United States due to Sangemino's efforts. It is sufficient if the Government proves that the defendant intended to receive a bribe and that the person paying him intended to pay a bribe.

Now, similarly as to Count 1, the payment of money by a private person to an official of the Government for the performance of an official act constitutes a fraud.

If the defendant held himself out as capable of aiding a member of the United States Army in seeking a hardship discharge or of assisting a Selective Service registrant in an attempt to obtain a medical deferment and received money because of this representation, you may find the defendant guilty of bribery on Count 2 regardless of whether he could actually obtain a discharge or reassignment for a member of the Army or deferment for a registrant.

There is some evidence before you from which you might infer that the defendant was able to aid members of the United States Army or registrants in procuring these results, and there is other evidence from which you might infer that members of the United States Army and Selective

Service registrants and their families believed incorrectly that the defendant was capable of procuring these results. Whether the defendant was capable of obtaining these results is a question of fact for the jury to determine and consider. However, I instruct you that even if you were to find that the defendant was not able to or didn't have the authority to influence decisions on hardship discharges or medical deferments at the Armed Forces examining station, this would not be a defense to the crime of bribery as I have described the elements of that crime to you.

You will recall that in stating the elements of the crimes of conspiracy and bribery I said that before you can convict the defendant of the crimes charged you muse, as one of the elements, find beyond a reasonable doubt that he acted knowingly and wilfully.

Now, I direct your attention to these words "knowingly" and "wilfully". What do they mean. First let me instruct you what these words do not mean. They do not mean that the Government has to show that the defendant knew he was breaking a particular law before he can be convicted of a crime. These words do not mean that the Government has to show that the defendant intended to profit at the expense of any other person, nor do they have anything

to do with his private motive or personal reasons for violating a statute. For, if, after considering all the evidence in accordance with my instructions to you, you come to the conclusion that the violated the law, then and in that event the defendant's personal or private reasons for violating the statute are of no consequence as far as guilt is concerned; but I instruct you that the words "knowingly" and "wilfully" mean deliberately, they mean intentionally. In other words, you must be satisfied beyond a reasonable doubt that the defendant acted with knowledge, consciously and in the exercise of his own will. The words "knowingly" and "wilfully" are opposed to the idea of an inadverent or accidental occurrence. An act is done knowingly if it is done voluntarily and purposely and not because of mistake or accident or mere negligence or some other innocent.

Knowledge and intent exist in the mind. It is not possible to look into a man's mind to see what went on there, and the only way you have for arriving at a decision on these questions is to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is

unnecessary. Knowledge and intent may be inferred by the jury from all the surrounding circumstances.

And as far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts.

A number of the acts allegedly performed by the defendant Sangemino are claimed by him to be on their face proper, leigimate actions, within the scope of his official function. He showed us that it was part of his job to attend to the resolution of problems affecting registrants. And, indeed, the evidence shows that constituents of congressmen and a senator and others were assisted by the defendant in a perfectly legitimate fashion.

The performing of these acts, however, is not the charge. The essence of the conspiracy to defaud and of the bribery charge is the payment and receipt of money in return for these acts from private persons, namely, Lemler.

For example, it may have been, and indeed was, perfectly proper and within his duties as a public information officer of the Selective System for Major Sangemino to speak to registrants, draft counselors and politicians in the course of his official duties. It was completely proper for the defendant to have spoken with officials of

the United States Army and local Selective Service boards within his duties at Selective Service. His duties wi these officials may have been perfectly consistent with the performance of the duties of his office.

However, if he was being paid by a private party such as Lemler for so doing, it becomes criminal within the context of Count 2.

Now, members of the jury, I am coming next to Count 3, and I recognize that this has been a warm room, that it is getting a little late. I am going to ask you if you all won't stand up and take sort of a seventh-innning stretch and see if you can relax your muscles and then we will resume. If anyone actually wants a recess, I will stop, but I haven't got very much more.

(Pause.)

I will now read Count 3.

"The Grand Jury further charges:

"1. On or about March 20, 1974, inthe Southern District of New York, William Sangemino, the defendant, having duly taken an oath as a witness that he would testify truthfully before a Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Southern District of New York and inquiring for that District, unlawfully,

wilfully and knowingly and contrary to said oath did make false material declarations to said grand jury as set forth below.

"2. At the time and place aforesaid, the grand jury was conducting an investigation, pursuant to Title 18, United States Code, Section 201 to determine whether employees of the Selective Service System and the United States Army had corruptly asked, demanded, exacted, solicited, sought, accepted, received or agreed to receive things of value to influence the full and faithful service of members of the United States Army and to influence the fair, impartial and honest selection of men eligible for service in the United States Armed Forces.

"3. It was material to the grand jury investigation to determine whether the defendant had ever directly or indirectly, solicited or received any money or other thing of value from Nathan Lemler or others.

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4. At the time and place aforesaid William Sangemino, the defendant, appearing as a witness under oath, did testify falsely with respect to the aforesaid material matters as set forth below:

"Q Did you ever in your job receive any remuneration for helping Selective Service applicants, any money or other things of value?

"A No. I got $50 for a speech once.

"Q You did not receive any money at any time for helping a Selective Service applicant?

"A No, I did not receive any money at any time for that.

"Q Did you ever assist anyone who was already on active duty in getting a discharge?

"A Several times.

"Q Did you ever take any money for that?

"A No, I did not.

"Q Did you ever have any dealings with Dr. Nathan Lemler?

"A Yes.

"Q Did you ever take any money from him?

"A No.

"Q For any reason?

"A No, not for any reason.

"Q I would also like to advise you that if you wilfully give a false answer to any of my questions that consticutes perjury and you can be prosecuted for that.

"A Yes, but he never offered me any money to do anything illegal.

"Q Did you ever take any money, period?

"A No, I never took any money, period.

"Q From Dr. Nathan Lemler?

"A No, I did not. I mean, I see what you are getting at but he didn't have to give me any money. That is my job, to do what I did for him.

"Q Did you in fact assist Dr. Nathan Lemler with some of his clients in their Selective Service problems?

"A Yes, I did.

"Q Did you ever take any money for that?

"A No, I did not."

That's the end of count .

Now, count 3 is charged under Title 18, Section 1623 of the United States Code, which is entitled "False declarations before grand jury or court,"and the pertinent provisions of that statute read as follows:

"Whoever under oath in any proceeding before any court or grand jury of the United States knowingly makes any false material declaration is guilty of a c rime."

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Now, simply stated and for purposes of this case false declaration is the wilful giving of false testimony as to a material matter before a grand jury while under oath.

In order to sustain its burden of proof with respect to count 3 the government must establish beyond a reasonable doubt these three essential elements. I will now give the jury the three elements of count 3:

First, that on or about March 20, 1974, William Sangemino took an oath to testify truthfully before a grand jury in the Southern District of New York, a body authorized by law to administer an oath.

The second element: that he then made false statements under oath as set forth in the indictment knowing those statements to be false.

Third, that the matters about which it is charged he testified falsely were material to the issues under inquiry by the grand jury.

Now, in the present case there seems to be no dispute that on the date set forth in the indictment this defendant appeared before a grand jury in the Southern District of New York; that he took an oath before that grand jury that he would testify truthfully, and that the grand jury was authorized by law to administer oaths, and that he

slh4

testified as set forth in the indictment.

The minutes of the grand jury are in evidence in this case as Exhibit 16, and if you find from those minutes that the grand jury in the Southern District of New York was investigating the payment of money to Major Sangemino or investigating irregularities in the processing of Selective Service registrants, I instruct you as a matter of law that the matters about which the defendant testified, as set forth in the indictment, were material to the issues under inquiry by the grand jury before which the testimony was given.

You must direct your attention, then, to the second element which I have outlined, and it raises the following two questions for you to consider with respect to count 3:

1. Was any part of the testimony given by William Sangemino as listed in the indictment false?

2. Did he give any part of that testimony knowing at the time he gave it that it was false?

Count 3 charges the defendant with making several false declarations to the grand jury, and it is not necessary that the government prove that each of those fact declarations was false. It is enough for a conviction on this count if the government proves beyond a reasonable doubt the falsity of any one of the declarations sworn to by William Sangemino

slh5

before the grand jury and listed in count 3 of the indictment.

Now, here again this is a crime which requires a specific intent and it must appear to your satisfaction beyond a reasonable doubt that the defendant intended to and did lie under oath to the grand jury.

Now, all of us know what a lie is. A mere mistake or a failure of recollection or a misunderstanding of the question or any other innocent error of that nature in giving testimony will not constitute the crime of giving false testimony which is charged against the defendant in this case as count 3.

Now, the law, of course, recognizes no excuse and no justification for false testimony given knowingly. A witness is compelled by law to testify truthfully under oath before a grand jury if he is called to testify and does so.

One or two other matters and then I am reaching the close of my instructions:

Under your oath as jurors you cannot allow any consideration of the punishment which may be inflicted upon the defendant if convicted to enter into your verdict in any way or in any sense affect your deliberations. The duty of sentence rests exclusively upon the court.

Your function is to weigh the evidence in the case

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and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence and the evidence alone, and you must not be influenced by any assumption or conjecture or sympathy or any inference not warranted by the facts which have been proved to your satisfaction.

If you fail to find beyond a reasonable doubt that the law has been violated you should not hesitate for any reason at all to find a verdict of acquittal. On the other hand, if you should find that the law has been violated as charged with respect to any count in this indictment, you should not hesitate because of sympathy or any other reason to render a verdict of guilty as a clear warning that a crime of this character may not be committed with immunity. The public is entitled to be assured of this.

A word about deliberating: each juror is entitled to his or her own opinion. Each should exchange views with fellow jurors. That's the very purpose of jury deliberations, to discuss and consider the evidence, to listen to the arguments of fellow jurors and to present individual views, to consult with one another, and toreach a verdict based solely and wholly on the evidence if you can do so

slh7

without violence to your individual judgment. But each one of you must decide the case for himself or herself after consideration with your fellow jurors.

You should not hesitate to change an opinion you may hold which after discussion with your fellow jurors appears erroneous in the light of the discussion, viewed against the facts and the evidence and the law. However, if after carefully weighing all the evidence and listening to the arguments of your fellow jurors you entertain a conscientious view that differs from the others, you are not to give up and yield up your judgment simply because you are outnumbered or outweighed.

b2 Your final vote must reflect your individual conscientious judgment as to how the case should be decided.

In order to find a verdict on any count it must be the unanimous decision of all 12 jurors.

Now, in the course of your deliberations you may want to have some part of the testimony read to you, or you might find that you are uncertain as to the meaning of some part of my instructions.

Now, in any such case you may send a note to the court through your foreman asking for whatever will clear up any other questions which you may have.

You can also send for any or all of the exhibits

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in evidence by such a note.

I have mentioned to you earlier that if you want to hear either or both of the tapes you may so inform the court by a note.

If you ask for a copy of the indictment by a note from your foreman, that will be sent to you, but, as I noted earlier, an indictment is merely a charge or an accusation and it has no standing as evidence.

Now, when you send out any note please do not indicate in that note how the vote of the jury may then be divided, because that is something we don't want to know. So don't tell us in the note what the vote is unless the vote be unanimous and you have a verdict, in which case inform the U.S. Marshal that you have a verdict.

Your foreman will be Mr. Bross, and he will send out any communications from the jury by delivering a note to the Marshal.

I ask you not to request the reading of testimony until after you have discussed it, but if anyone wants it of course we are happy to oblige.

Now, let me finally state that your oath sums up your duty as jurors, and that is that without fear or favor to anyone you will well and truly try the issues between this defendant and the government of the United States

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based solely upon the evidence and the court's instructions as to the law.

It's important to the defendant; it's important to the government.

Now, you alternates -- and it turns out that we have been fortunate, we have not had to call upon your services, you are now excused. That is, Eleanor Bodie, Michele Delgenko, J. Berkley Smith and Sonya Rivera.

Do not discuss this case with anyone until after a verdict has been recorded and the balance of the jury excused. You four may withdraw from the courtroom and the clerk will give you your jury certificates. You are excused with my thanks. I appreciate your attendance and your attention here.

(The alternates left the jury room.)

THE COURT: Now members of the jury, I am going to ask you all to remain seated in the box where you are briefly while I confer with the attorneys to see if there are any additional instructions which they would like to have me mention to you, or if there is anything I may not have covered in my previous statement; and in this regard I ask you to be patient a little bit longer and do not discuss the case while seated in the box, because there is a possibility that I might find it proper to give you

slh10

additional instructions which you may not presently have received.

So please be seated where you are for a few minutes.

(At the side bar.)

THE COURT: Are there any additional requests or exceptions?

MR. HARRIS: None from the government.

THE COURT: Mr. Brettschneider?

MR. BRETTSCHNEIDER: I do have one with respect to the consideration by the jury of the prior criminal record of any witness with respect to their credibility.

THE COURT: You are a little late with that, you know. I asked you several times for any requests to charge. That matter has never been discussed with me. The only one I know who had a criminal record is Lemler, and I think that has been well argued.

MR. BRETTSCHNEIDER: All right, Judge.

THE COURT: I decline to give that at this time. Anything else?

MR. BRETTSCHNEIDER: No Judge.

THE COURT: All right.

(End of side bar discussion.)

THE COURT: Members of the jury, will you kindly

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

No. 74 Cr 928
75 Cr 127

WILLIAM SANGEMINO

- - - - - - - - - - - - - - - - - - - x

Defendant Sangemino's Motion for a New Trial

Now comes the defendant, WILLIAM SANGEMINO, by his attorney and respectfully moves this Honorable Court that the verdict of April 18, 1975 be set aside and that a new trial be granted.

This motion is predicated upon the grounds that such a new trial is "required in the interest of justice", as stated in Rule 33, Federal Rules of Criminal Procedure, and on the Fifth and Sixth Amendments to the Constitution of the United States.

The defendant was denied the effective assistance of counsel. His representation at trial was so woefully inadequate as to shock the conscience of the Court and make the proceedings a farce and mockery of justice. The record and supporting materials provided herewith indicate a total failure to present the cause of the accused in any fundamental respect. We believe that the specific allegations made in the supporting Memorandum

of Law, taken individually and collectively, meet the stringent standards necessary to show inadequacy of counsel, and that the legal representation of the defendant was constitutionally defective.

WHEREFORE, the defendant prays as follows:

1. That the verdict of guilty be set aside and that a new trial be ordered;

2. For such other and further relief as this Honorable Court may deem just and proper.

By his Attorney,

Michael B. Pollack

MICHAEL B. POLLACK
1345 Avenue of the Americas
New York, New York 10019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA No. 74 Cr 928
75 Cr 127

-against-

WILLIAM SANGEMINO

- - - - - - - - - - - - - - - - - - - - - - x

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SANGEMINO'S MOTION FOR NEW TRIAL

In his motion the defendant moves the Court to grant him a new trial based on the incompetent assistance of counsel he received at his trial. Such grounds are not generally favored by the courts. However, recent developments are bringing more and more to light the growing dissatisfaction of the members of the judiciary with the quality of advocacy in our courts. In an article entitled "The Court Needs A Friend" in Volume 60 ABA Journal, February, 1974, Chief Judge Irving R. Kaufman of the Second Circuit Court of Appeals wrote

> The Advocate is a partner of the court in the important enterprise of dispensing justice. I am concerned about the future of this partnership in the light of what many perceive to be a decline in the quality of advocacy at both the trial and appellate levels. I began to develop this

> theme several months ago, and I am happy that Chief Justice Burger also has brought his considerable talents to a discussion of the subject in his Sonnett lecture at Fordham on November 29 (see page 171 of this issue).
>
> In our adversary system, the quality of justice dispensed by the courts is ultimately dependent on the quality of advocacy provided by the bar. If lawyers fail as advocates for want of skill or dedication, then judges surely will fail as well, and the coin of justice will be debased beyond recognition. This interdependence of bench and bar is the linchpin of our legal system. Contemporary developments make this relationship even more crucial.

Noting an increasing trend by lawyers to allow judges to protect the record by accurately ruling on evidentiary and legal matters, Chief Judge Kauffman further stated,

> To put it bluntly, judges cannot compensate for lawyers who do not present their clients' cases as well as wit and effort allow. It is not the judge's task to marshal arguments, find citations, distinguish other apparent precedent, and present the facts -- without the aid and guidance of counsel. To the extent we are able to do it all without that help, it will be at the expense of practicing our craft of judging.

In the same issue of the American Bar Association Journal at page 173 the following is attributed to Chief Justice Warren Burger of the United States Supreme Court,

> Based on his conversations with judges and experienced lawyers over the past twelve to fifteen years, the chief justice estimated that "as a working hypothesis from one third to one half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation.

From which class or segment of our society is the unqualified advocate most likely to draw his clientile? Addressing himself to this problem, Chief Judge Kaufman stated,

> To say that the recent interest in improving advocacy is an effort to create an elite corps of lawyers is thoughtless and unfair criticism. Large corporations and the wealthy have no difficulty in retaining the best qualified trial lawyers of the bar. The very poor or indigent, in many instances, will be well represented by trained legal aid counsel. But the great mass of people who fall into the lower middle class and can pay a small lawyer's fee run the risk of getting what they pay for -- an inexpensive but poorly trained lawyer.

This is exactly what happened to Major William Sangemino. (See Affidavit)

Initial thoughts on the subject of incompetent assistance of counsel would lead one to think that such criticism would be leveled at the younger members of the Bar. Chief Judge Kaufman indicates that this is not the case when he stated,

> But candor requires us to admit that the concern over the qualifications of advocates in the federal courts is not born solely of doubt about the skills of the neophyte. While no amount of education can adequately replace the whetstone of experience in sharpening the advocate's skills, there is good reason to suppose that in learning, natural abilities, and commitment, today's graduates are better equipped than ever to acquire the practical talents essential to capable lawyering. <u>Many of those already practicing fall far short of the minimum desirable level of competence.</u> Time and again during the hearings on the proposed rules we heard the cry that too much emphasis was being placed on the budding lawyer, while nothing was being done about the incumbent incompetent.
>
> (emphasis added)

Defendant respectfully submits that certain of his fundamental constitutional rights were abridged by the ineffective assistance of a counsel whose trial experience was questioned by the judge at trial.

I.

Rule 33 of the Federal Rulse of Criminal Procedure provides that "the court may grant a new trial to a defendant if required in the interest of justice." The Fifth Amendment to the United States Constitution ordains that "no person shall be...deprived of life, liberty, or property, without due process of law." Furthermore, "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Const. Amendment VI. "It has long been recognized that the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). (emphasis supplied). See also Powell v. Alabama, 287 U.S. 45,71 (1932).

The defendant moves for a new trial on the ground that he was denied the effective assistance of counsel at his original trial. "The current standard of ineffective assistance of counsel in this circuit is that in order to be of constitutional dimensions the representation be so 'woefully inadequate as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'" United States v. Yanishefsky, 500 F.2d 1327,1333 (2d Cir. 1974), quoting United States v. Currier,

405 F.2d 1039,1043 (2d Cir. 1969), cert. denied 395 U.S. 914 (1969); see also United States v. Ortega-Alvarez, 506 F.2d 455 (2d Cir. 1974).

Defendant's motion is predicated on the fact of a "total failure to present the cause of the accused in any fundamental respect." United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963). The record in the instant case is replete with instances wherein trial counsel failed to exercise the standard of diligence and competence expected of a criminal lawyer. Taken individually and collectively, defendant submits that they satisfy the "stringent standards to be met to show inadequacy of counsel," United States v. Maxey, 498 F.2d 474,483 (2d Cir. 1974), and that his "'egal representation [at trial]was constitutionally defective." United States v. Yanishefsky, supra at 1334.

II.

Counsel will attempt to set forth the incidents of ineffective assistance in the transcript. At page 101 of the trial transcript (TR.) the following discussion took place:

> Q After you received your fee, what, if anything, did you do?
>
> A I discussed the matter with Major Sangemino.
> THE COURT: When and where did you do this?
> THE WITNESS: At the Major's office.
> MR. BRETTSCHNEIDER: May we have a date?
> THE COURT: Yes, fix the date of any discussion, Mr. Harris.

Nowhere on the succeeding pages of the transcript does the prosecutor attempt to comply with the Court's directive nor

does defense counsel object to such failure of compliance.

Discussion at the trial concerned the admissability of an EEG examination of Richard Falcoff which was shown to the defendant by the prosecutor before the trial. Such exhibit was extremely relevant to establish that Richard Falcoff was deferred from the service because of a history of epilepsy dating back to 1959. At page 736 of the transcript, the following discussion occurred,

THE COURT: Is Mr. Falcoff named in the indictment?

MR. HARRIS: Yes, he is.

THE COURT: Well, you knew about Falcoff since time in 1974.

MR. BRETTSCHNEIDER: No, Judge. The only thing we knew was the name.

THE COURT: Well, you had plenty of time to ask the government where is Falcoff.

MR. HARRIS: The grand jury testimony has been marked. It has a 3500 number.

THE COURT: What is the number?

MR. BRETTSCHNEIDER: 3590.
May I ask the Court to examine it and see whether --

THE COURT: No, because you haven't shown necessity. You made no effort to find Falcoff.

MR. BRETTSCHNEIDER: Judge, I have indicated to the court what efforts we have made --

THE COURT: They are not satisfactory to me and I decline to take it.

This conversation so followed on page 737 by the following direct charge of lack of diligence by the Court.

MR. BRETTSCHNEIDER: Judge, we have the addresses of Falcoff.

THE COURT: Well, I am not going to take the grand jury testimony but you can mark it for identification so you can preserve your rights on appeal.

It doesn't show very much diligence because you knew about the name of Falcoff from the day the indictment was filed.

Another effort was made later in the trial to introduce this exhibit. Again the Court refused its admission for lack of a proper foundation. (TR 1022). In denying the request to introduce the document it was quite clear that numerous alternative ways were available to counsel to lay a proper foundation and none were accomplished because he failed to examine the file. (TR 1021). The above stated lack of diligence is further testified to when the Court on its own motion moves to exclude government exhibits 7 and 7A. In ruling on opposition to the exclusion the Court notes it is not changing its mind but that when the exhibits were offered "No proper objection was made". TR. 1045.

The Falcoff case is of central importance to this case when you realize that;

(1) Lemler claims to have fixed 400 cases but the prosecution offers evidence on approximately four cases;

(2) The credability of Nathan Lemler is at the heart of these charges and if Falcoff did not pay to have his selective service problem handled this undercuts Lemler's credability on the other cases;

(3) Why would any father pay to have his son excluded from Military Service on false grounds when he has sufficient grounds dating back at

least ten years.

In his direct testimony Nathan Lemler was asked these questions and gave these answers at page 139 (TR.)

Q Did you ever have a client named Richard Falcoff?

A Yes, Sir.

Q Would you tell us when he became a client of yours?

A As near as I can place it offhand, sir, it would be some time in 1970.

At Page 140 (TR.)

Q Did Mr. Falcoff come and consult you?

THE WITNESS: Yes, sir.

THE COURT: Give that conversation; state who was present, when it was, when it was.

MR. HARRIS: I am not interested in that conversation.

Q Did you agree to perform services for Falcoff?

THE WITNESS: Yes

Q And what services did you tell him you would perform for him?

At Page 142 (TR.)

A Get him a selective service deferment.

Q Tell us what Mr. Falcoff requested.

A Just Selective Service deferment. He had no educational problem....

Q Did there come a time when you performed any services for Mr. Falcoff in regard to Selective Service?

A I spoke with Major Sangemino about the matter.

Q What, if anything, did you do as a result of your conversation with Major Sangemino?

A I had the registrant visit Dr. Wesolouski.

Q What was the purpose of that visit?

A To arrange for there to be some medical defect that would be acceptable for deferment.

Q What defect was arranged for, if you know?

A Well, as I recall it, sir, there were two: Originally, it was for a polynodal cyst; ultimately it was for epilepsy."

Compare the above testimony to exhibit 3590, the Grand Jury testimony of Richard Falcoff on June 24, 1974. In that testimony he says,

(1) He had epilepsy which he felt would disqualify him from the Military;

(2) He never met Nathan Lemler, his parents did;

(3) The purpose of meeting Lemler was to get him into Fordham Law School;

(4) Q Did your parents ever have any contact with Lemler regarding your Selective Service?

A No.

(5) He told the doctor at AFEES that he had epilepsy and was told he'd be recalled and at that time he'd have to prove documentation;

(6) He did not see a Doctor in 1971 for epilepsy;

(7) Spoke to Lemler once about his grades in school.

Norman Falcoff, the father of Richard, also appeared in the Grand Jury on June 24, 1974. He testified:

(1) He spoke to Lemler about getting his son into Law School;

(2) Richard submitted medical documentation on his epileptic condition to the prosecutor;

(3) Q What, if anything, did Mr. Lemler do for you in regard to your son's Selective Service status?

A Actually, he did very, very little. When he told me he might be helpful, I told him it wouldn't be necessary, based on his physical condition, and I asked him, I pointed the question to him, whether it was a residual benefit he was offering to me in this matter here in case I had to appeal, and he said it might be, and that was the end of it.

Q When was it your son first met Dr. Lemler

A He never met him.

Defense counsel's lack of diligence in finding these two witnesses in and of itself was sufficient to deny the defendant with effective assistance of counsel. Add to this the fact that the witness Lemler was never confronted with and questioned about these assertions must shock the senses of this Court and make the proceedings a mockery of Justice.

Compounding and aggravating the Falcoff situation is the way defense counsel handled the production of Ex. 14, tape recorded conversation between the witness Lemler and Mrs. Petro. He asked for these tapes in open Court causing the Judge to comment "I think you have opened the door to the tapes, and after I have had a chance to look at the transcript, I will see whether you can bring them in on re-direct examination. (TR 372).

Nowhere can there be a more explicit display of the shock to the conscience of the Court than on page 466, 467 and 468 of the transcript:

> THE COURT: You opened the door, you know. You demanded it in front of the jury. The only basis on which I would takeit would be bearing on his truthfulness, that is all.
>
> MR. HARRIS: As a prior consistent statement?
>
> THE COURT: That is all. I would only take it --
>
> MR. BRETTSCHNEIDER: I have never said there was not a tape, Judge, nor did I indicate anything else. I have not read it.
>
> THE COURT: What you did in the jury's presence, really, was bordering on the foolhardy with respect to this tape. I do not understand why anybody would do it.
>
> I think you ought to read it so that you will have an opportunity to state your objection, and I will.hear you at about twelve after two in the absence of the jury. I will have the jury come back at 2.30.

MR. BRETTSCHNEIDER: If the Court pleases --

THE COURT: It would have to come in with a limiting instruction, but you cannot protect your rights until you have had a chance to read it.

MR. BRETTSCHNEIDER: I have not seen it yet, Judge.

THE COURT: I will let you read it.

MR. BRETTSCHNEIDER: Judge, I would like at this time to offer into testimony --

THE COURT: You are not in a basis to offer testimony. He is proceeding with his direct. We have not come to the defendant's case. What are you going to offer if he has not rested?

MR. BRETTSCHNEIDER: This is the statement, the grand jury minutes of Leonora Resnick.

THE COURT: Absolutely not. When the defendant's case goes forward, you may make an offer at that time.

MR. HARRIS: I have offered to provide counsel --

THE COURT: How many years have you been practicing?

MR. BRETTSCHNEIDER: Many, Judge.

THE COURT: How many?

MR. BRETTSCHNEIDER: Over 20.

THE COURT: You have done crimin trials during that period?

MR. BRETTSCHNEIDER: That is right, Sir. If I can state my basis on the record, why we are doing it --

THE COURT: No. You cannot offer evidence until he finishes with this witness and rests.

Defense counsel's request to admit the Grand Jury testimony of Leonora Resnick during the prosecution's case

shows a lack of knowledge of trial procedure as well as a lack of knowledge of the applicable law in this Circuit. This request was renewed at TR. 532. The rule for use of Grand Jury testimony as affirmative evidence is stated in the case of United States v. DeSisto, 329 F.2d 929 (2nd Cir., 1964) which allows the proponent to use a witness' grand jury testimony as affirmative evidence in contradiction to his trial testimony where there is an opportunity to cross examine the witness at trial. This lack of knowledge is compounded by indifference and lack of diligence as exemplified at TR. 474

> THE COURT: Why don't you take the weekend and see if you can't locate Mrs. Resnick.
>
> MR. HARRIS: I offered to give him Mrs. Resnick's address this morning and he said he didn't want it.

Additional areas where counsel exhibits a lack of diligence or ignorance of applicable law are;

TR. 1094 where on summation he states "...if you believe the questions of Mr. Harris..."

TR. 212 when he asks Lemler about his "past record"

TR. 238-239 where he continues to question Lemler about his status as a Government informant in a way to build him up as the kind of fellow who works free for the government.

Other small instances where counsel showed a complete lack of diligence in the courtroom were on

Page 327 TR. when he failed to move to strike out the unresponsive answer on Line 20.

> Q What did he do?
>
> A If he did nothing, he took money under false pretenses. I do not know what he did.

Page 513 TR. when he failed to move to strike out Harriet Tollen's unresponsive answer

Q Calling your attention on one of the three occasions when your father returned to the car , did he say anything to you?

A Yes, he passed a remark that he thought it was very humorous that he had to go to the men's room to pay Sangemino his money.

Q And I ask you, were these the exact words your father used?

A No.

Q Will you please tell the jury what the exact words were?

A He had to go to the crapper because that was the only place they could have privacy.

Nowhere in the exact wording was any mention made of money. Yet in a question on page 520 defense counsel re-enforced in the jury's mind that Lemler used the word money when he asked: Q Did you see him write what you said:

"My father said when he came out of there I gave him money in a crapper?

Page 565 where the Court sustains the objection to the introduction of a document which could have been used to impeach Lemler when he was on the stand.

At various times throughout the proceedings the Court asked counsel if he wished to submit requests to change. See TR 607, 1024. On all such occasions counsel said he did not, except after summation when the Court refused an oral request as being untimely. TR. 1215. One instruction which had extreme merit in the facts of this case was §71.19 Devitt & Blackmar, Federal Jury Practice and Instructions.

"If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not."

If this instruction were refused certainly §12.15 of Devitt & Blackmar supra was applicable. This instruction was very important when one considers Lemler was so sure of how many encounters he and Sangemino had because of his little white cards. TR. 64,215. He further testifies on Page 65 he gave those cards to his daughter Harriet Tollen who denied being given or having the cards. On Page 93 Lemler states records, including Ex. 1 & 2, where taken pursuant to a subpoena by the Attorney General of the State of New York. The prosecutor stated the Attorney General does not have the records nor does the Nassau County prosecutor. TR. 93 See TR. 70.

The failure to present any requests to charge is a living example of Judge Kaufman's statement supra. "To put it bluntly, judges cannot compensate for lawyers who do not present their client's cases as well as wit and effort allow. It is not the judge's task to marshall arguments, find citations, distinguish other apparent precedent, and present the facts -- without the aid and guidance of counsel."

Counsel's attempt to put forth a defense case was the subject of little planning or preparation. The effect of the defense case, rather than establishing at the very least a reasonable doubt or at best the defendant's innocence, seemed to have the effect of further proving the prosecution's case. See TR. 1043. Those witnesses who were called were poorly prepared, in fact, what little preparation that did take place usually occurred in the corridor outside the courtroom during a recess. See Affidavits of Spiegelman and D'Ambrosi. Several witnesses, called as character witnesses, could not be so qualified. See TR. 716. Others, such as Gross and Garanfis, sat in the courtroom in violation of the exclusion order, until counsel met them in the hallway during a recess. TR. 734. This method of hallway preparation is never to be recommended to a diligent and conscientious practioner, but in a case involving

the intricacies of the Selective Service Law it was especially devestating. In his affidavit, Aldo L. D'Ambrosi states he was prepared in the hallway, and had more time been spent with him he could have explained Exhibit 4, the business card, and the fact that other members of the Selective Service Staff referred individuals taking their pre-induction physical examinations to him. Evelyn Cohen also states she was not properly prepared to testify by defense counsel and that she was unable to state that in her observation the door to Sangemino's office was always open when Lemler was with him.

Archie Spiegelman, who testified on Major Sangemino's behalf, was also prepared in the hallway. Counsel confirms this on Page 615 (TR.) when he calls the witness, Archie Spielberg. This could have been a key witness if properly prepared because he has previously been qualified as an expert witness in Selective Service matters. Properly prepared and questioned, Spiegelman could have been asked hypothetical questions based on Lemler's testimony to contrast the feasibility of the story. He could also have reviewed the files for indicia of fraud, as indeed he did for the prosecution. See affidavit. Rather than aiming this witness at the jugular of the prosecution's case, counsel chose to use him to inject some levity into the proceeding. This was done by recounting bizarre incidents which had no relevance to the charges before the Court. Spiegelman states, "I have testified in at least twenty federal trials and never have I been subjected to such shoddy

and haphazard trial preparation by an attorney." See also the affidavit of Joseph Winckler.

In addition to not preparing those witnesses he did call to testify, counsel also refused to call several additional witnesses who had competent and relevant testimony to add to the defendant's case. Major Sangemino asked counsel to call Mrs. Dahl to see if she would refute Lemler's charges. TR. 440.

Eric Palmer offered to testify but was rejected by counsel because it was felt that further testimony would hurt the case, that the Judge was antagonistic already, and that anything that would further prolong the trial would be detrimental in the long run. Palmer's testimony was relevant to dispel the growing thought in the courtroom that the defendant only helped the powerful and influential because they helped or paid him. Extending himself for this young man could only seriously rebut the prosecution's theory of the motivation for the defendant's conduct.

Margaret Sangemino is the defendant's daughter who asked to testify regarding the allegation her father solicited airline tickets because that was the only way he could travel. See TR. 412,413. Her affidavit clearly shows an ability of the defendant to travel at prices he could afford without soliciting tickets from Lemler.

Lieutenant Colonel William McPhail, Jr. and Lieutenant Colonel Robert C. Wiard, Jr. wished to testify about their

years as Commander, Armed Forces Examining and Entrance Station, Fort Hamilton, Brooklyn, New York. Both wished to explain the AFEES station, the procedures followed, the personnel on duty, the virtual impossibility of determining with any certainty which Doctor would be on duty on a particular day. Each could have been asked questions on the possibility of accomplishing the different feats Lemler attributed to the defendant.

Lt. Colonel Nicholas DeMaria submits an affidavit stating he had agreed to testify and was given a subpoena to testify. Counsel never called him. One reason for this, as stated in Major Sangemino's affidavit, was counsel's concern that the jury might confuse DeMaria with the mysterious Co. Nicholson. Lemler testified at great length about a compassionate re-assignment for Major Weiss. TR. 82-92. He testified that Sangemino arranged this for Major Weiss, who was stationed at Fort Hood, Texas by calling Weiss' commander in Washington. TR. 86. Lt. Colonel DeMaria refutes this as the accurate procedure for a compassionate re-assignment. Further, if such a request were made when Weiss was home in New York, it would have gone through Lt. Col. DeMaria and that no employee of Selective Service can intervene in the established procedures and chain of command.

Major Sangemino's son Richard offered to testify at the trial. He would state how his father had twice turned down his requests to get him out of the service or at least re-assigned.

Both Frederick H. Cohn, Esq. and Edwin J. Oppenheimer, Jr., Esq. were respected members of a small group of lawyers

specializing in Selective Service problems. Both offered to testify about the defendant's good reputation for truth and virascity. Mr. Cohn was not called because he was not given the courtesy of sufficient notice to allow him to clear his schedule of court appearances so that he could testify, and Mr. Oppenheimer was simply never called. Both are respected members of the bar who have had dealings with the defendant on matters involving the influential and the down-trodden. Both would testify to his professional behavior and excellent reputation.

Counsel is aware that the selection of witnesses is a matter of trial strategy which appellate courts are reluctant to second guess. United States v. Yanishefsky, 500 F2d 1327 (2nd Cir. 1974). However, when those who are called are not diligently prepared to testify about facts relevant to the defendant's case, and so many other relevant witnesses are not called at all, it is only the courts who can protect the defendant's right to a fair trial.

## CONCLUSION

Under the current decisions of the Court of Appeals for the Second Circuit, ineffective assistance of Counsel reaches constitutional dimensions when the defendant's representation is so inadequate as to shock the conscience of the Court and make the proceedings a farce and mockery of justice. See U.S. v. Yanishefsky, supra; U.S. v. Ortega-Alvarez, supra. Defendant Sangemino respectfully contends that the trial judge's

consistent criticism of both Mr. Brettschneider's diligence in pre-trial preparation and his conduct during trial, evidences a distinct lack of even minimal acceptable competence. The failure to investigate material facts and points of law, the failure to call known and indispensable witnesses, and the grossly inadequate preparation of those witnesses who were called, indicate that trial counsel failed to live up to the standards of normal competency expected of trial counsel in this jurisdiction. The trial judge did not hesitate to single out counsel's substantial errors of law, and the failure to request vital and proper jury instructions was an action in complete disregard for the defendant's interests. Defendant submits that the record, taken in its entirety, constitutes a mockery of justice, and prays therefore that a new trial be granted "in the interest of justice", pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

By his Attorney,

Michael B. Pollack

MICHAEL B. POLLACK
1345 Avenue of the Americas
New York, New York

AFFIDAVIT OF RICHARD SANGEMINO IN SUPPORT OF MOTION 441a

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF KINGS

I, RICHARD SANGEMINO, RESIDING AT 138B FORT HAMILTON, BROOKLYN, N.Y., BEING DULY SWORN DEPOSES AND SAYS:

I AM THE SON OF WILLIAM F. SANGEMINO, MAJOR, U.S., THE DEFENDANT IN U.S. GOVERNMENT AGAINST SANGEMINO.

ON DECEMBER 30, 1971, I WAS SWORN INTO THE U.S. ARMY. ON JANUARY 2, 1972, I BEGAN THE NINE WEEK BASIC COMBAT TRAINING COURSE AT FORT DIX, N.J. DURING MY SECOND WEEK OF TRAINING I BECAME VERY DISCOURAGED AND DEPRESSED. I REMEMBER CALLING HOME ON A SATURDAY AND ASKING MY FATHER, MAJOR WILLIAM SANGEMINO, IF THERE WAS ANY WAY OUT OF MY COMMITMENT. HIS REPLY WAS IN THE NEGATIVE AND HE ADVISED ME TO DO THE BEST I COULD TO STICK IT OUT.

DURING MY FOURTH WEEK OF TRAINING I WAS INJURED WHILE PARTICIPATING IN PHYSICAL EXERCISE. BECAUSE OF THE INJURY I WAS REQUIRED TO USE CRUTCHES FOR ONE WEEK. THE CHIEF DRILL SERGEANT ACCUSED ME OF BEING A MALINGERER, REVOKED MY WEEKEND PASS HOME, LEAVING ME TO SPEND THE WEEKEND ALONE IN

THE BARRACKS, MOPPING AND SCRUBBING THE FLOORS. I WAS SO DEPRESSED AT THIS POINT THAT I CALLED HOME AND ASKED MY FATHER IF HE WOULD MAKE THE TRIP TO FORT DIX AND VISIT ME. HE AGREED. WHEN HE ARRIVED I AGAIN ASKED HIM IF THERE WAS ANY WAY OUT FOR ME. AGAIN HIS REPLY WAS IN THE NEGATIVE. HE ENCOURAGED ME AND TOLD ME TO SWALLOW MY PRIDE AND STICK IT OUT. I TOOK HIS ADVICE, MADE IT THROUGH BASIC TRAINING, ADVANCED TRAINING AND THREE YEARS AS A MILITARY POLICEMAN BEFORE BEING HONORABLY DISCHARGED ON DECEMBER 2ND, 1974.

I WAS UNABLE TO ATTEND MY FATHER'S TRIAL AS I AM A FULL TIME STUDENT AT PLATTSBURGH UNIVERSITY, BUT I WAS IN CONSTANT CONTACT OVER THE TELEPHONE. I OFFERED TO TESTIFY IN MY FATHER'S BEHALF AND HE SAID HE WOULD DISCUSS IT WITH HIS LAWYER. HE LATER TOLD ME THAT HIS LAWYER DIDN'T THINK IT WAS NECESSARY. IF I HAD BEEN CALLED I WOULD HAVE GIVEN THE ABOVE TESTIMONY.

Richard Sargeman

SUBSCRIBED AND SWORN TO BEFORE ME IN KINGS COUNTY ON THIS 25TH DAY OF JUNE, 1975

Margrione W. El

MARGRIONE W. EL
Notary Public, State of New York
No. 4526372
Qualified in New York County
Commission Expires March 30, 1976

# AFFIDAVIT OF NICHOLAS DE MARIA IN SUPPORT OF MOTION

## A F F I D A V I T

STATE OF New York )
COUNTY OF Kings )

I, Nicholas De Maria, residing at 111 Cloverdale Circle, New Shrewsburg, N.J., and employed by Dept. of the Army, located at Fort Dix, N.J., being duly sworn deposes and says that:

During the period from August, 1966 to February, 1970, I was on active duty with the U.S. Army. I held the rank of Lt. Colonel and was assigned as the Deputy Post Commander and Commanding Officer of the U.S. Army Personnel Center at Fort Wadsworth, Staten Island, N.Y.

One of my responsibilities was to review and process all requests from military personnel in the N.Y. area for compassionate reassignments and hardship discharges. My authority in these areas was limited to the review of the paper-work and documentation submitted to insure correctness and to forward the material to the Dept. of the Army in Washington, D.C. I was authorized by the Secretary of the Army to approve/disapprove those hardship discharge requests which were submitted to my office. ~~and which clearly did not warrant or meet the criteria for discharge~~. Approval for compassionate reassignments could only be given by the Dept. of the Army, who would then notify my office of the final determination.

I first became acquainted with Major William Sangemino in the mid-1960's when he was a Captain in the U.S. Army Reserves, commanding an artillery battery, one of the many I had to inspect and evaluate as part of my duties. When Major Sangemino was recalled to active duty with the Selective Service System, we communicated again over the telephone while I was seeking information on a case. One of the Major's duties at that time was that of Assistant Chief, Field Division, and he was able to promptly obtain for me and provide me with any needed information. Similarly, I was able to provide technical information in my areas to the Selective Service System. Never, from the time of our first contact, up to and including when I retired from Active Duty in February, 1970, did Major Sangemino ever suggest, imply, propose or even hint that he had any personal interest or concern in any matter that came before me. Ours was a professional relationship with high mutual regard.

Based upon my own personal experience and expertise in every facet of the procedures involved in my areas of responsibility, I do not believe it is possible that Major Sangemino could have influenced, arranged or effected the approval of any compassionate reassignment or hardship discharge. Further, I have read the testimony of Nathan Lemler in reference to the compassionate reassignment of Major (Doctor) Gerald Weiss, wherein he states that Major Weiss was given permanent state-side re-assignment as a result of a telephone call by Major Sangemino to Major Weiss' commanding officer in Washington, D.C. (page 86 of trial transcript). I find it inconceivable and completely impossible that this could be true. If Major Weiss was stationed in Fort Hood, Texas, that is where his commanding officer would have been; not in Washington. Additionally, the commanding officer would not have had the authority to approve a compassionate reassignment. Proper procedure would be, in Major Weiss' case, to present a documented request to his commanding officer in Fort Hood Texas, for forwarding, or to the nearest military personnel center to his home if the emergency so dictated. If this request was made in New York, it would have been presented to me at Fort Wadsworth, to forward through established military channels,

To the best of my knowledge, it would have been absolutely impossible for any employee of the Selective Service System to influence or intercede in this procedural chain.

When I first heard of the accusations against Major Sangemino, I volunteered to testify in his behalf. I was given a subpoena to testify in Major Sangeminos' behalf. I was told, by Major Sangemino, to stand by for word from his attorney, but was never called. If called as a witness, I would have testified to all the information contained in this affidavit.

I have read the above statement, consisting of two pages and it is true and complete to the best of my knowledge and belief.

Subscribed and sworn to
before me at Fort Wadsworth
on this 21st day of June 1975

Nick DeMarco
(Affiant's Signature)

Norris S. Einstein, Witness
Chaplain (LTC) USA

# NOTARY STATEMENT OF ROBERT WIARD IN SUPPORT OF MOTION

THE COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY NEWTON, MASS.

And now comes Robert C. Wiard, Jr., Lieutenant Colonel, United States Retired, and says that the four page statement is true to the best of his knowledge.

Robert C. Wiard

Then personally appeared before me Robert C. Wiard, Jr. and made oath that the foregoing affidavit is true, and of his own free act and deed, before me,

June 19,1975

Steven S. Konowitz

Steven S. Konowitz
Notary Public
My Commission expires Jan. 17, 1980

35 Atwood Street
Wellesley, Massachusetts
June 18, 1975

Michael B. Pollack, Attorney at Law
1345 Avenue of the Americas
New York, New York 10019

Dear Mr. Pollack:

I wish to make a statement regarding the case of the United States Government vs. William SanGemino, Major, United States Army Reserve.

I, Robert C. Wiard, Jr., Lieutenant Colonel, United States Army Retired, service number 049228567, hereby make the following statement of my own free will and with no offer or inducement of any type.

I took command of the United States Army Examining and Entrance Station at Fort Hamilton, New York on 11 July 1969. I then took a three-week leave, returning to Fort Hamilton on or about 3 August 1969. With the exception of one or two-week periods during which I took annual leave, I remained in command until my retirement on 31 July 1972.

As I review the procedures during the period in which I commanded the station, I cannot conceive of a situation in which an individual or individuals could collude to have an individual, and particularly a large number of individuals, examined by any particular medical practitioner, be he specialist or general practitioner. Further, the review of all examinees' records by a U.S. Army Medical Corps physician would preclude the manufacture of fraudulent statements by the civilian physicians employed by the station to examine registrants and applicants for enlistment. Furthermore, I have no doubt that each civilian physician employed by the station entertained no question in his mind that I would perform all necessary actions to have him barred from medical practice were I to become cognizant of any fraud or collusion on his part to disqualify selective service registrants, or to qualify applicants for enlistment in the armed services. The selective service personnel working in the medical station were assigned one office, and were limited in the areas of the station to which they had access. Any applicant or registrant brought to the medical section by the selective service representative was turned over to the station medical NCO, then the selective service employee left the medical section. The medical NCO then routinely processed the individual according to the type and extent of medical examination required.

To the best of my knowledge, large-scale collusion as is alleged in the case against William SanGemino is both theoretically and actually impossible, particularly as each general practitioner's and each specialist's analysis of the examination of the applicant was reviewed by an Army medical officer who was quite suspicious because of the large number of registrants claiming medical disabilities which they did not have.

During the three-year period, the station gave pre-induction and induction medical examinations and enlistment examinations for all four armed services. The procedures for conducting all steps of the examination and processing were extremely detailed by regulation, by the United States Army Recruiting Command regulations and directives, and by station operating procedures which were extremely detailed and replete with cross checks and double checks. The cross checks and double checks were necessary to preclude fraudulent enlistment by medically, mentally, and morally unfit applicants into the armed services, and to preclude qualification of medically, mentally, and morally unfit draftees from being inducted into the armed forces to the greatest extent, preclude medically, mentally, and morally fit draftees from evading induction. Additionally, procedures were established by U.S. Army regulations concerning remunerations of civilian physicians which required each physician to list the men he had examined on his work performance statement which was then forwarded for payment by the U.S. Army Finance Corps. In addition, each physician who examined an applicant for any reason was required to sign his medical statement of findings and/or sign the examinee's medical examination record. Due to the budgetary constraints, the Inspector General of the Army and the various comptroller office auditors checked the physicians' statements of work performance on a regular annual, semi-annual, and frequently, quarterly, basis. These statements of work performance listed the examinees, and the examinees' record jackets were checked to ensure that the physician's statement and signature were properly affixed to the individual's record. Statements by medical examiners became a permanent part of the individual's records and were sent as part of his records jacket with the examinee when inducted or enlisted, and remained part of his medical file for the duration of his service career. They were retired with his records to the various service records centers upon the individual's discharge from the service.

Statements by civilian physicians employeed by the examinee at his own expense to either attest to the fact that he was medically or psychologically unfit for military service, or was fit for military service were also kept as a permanent part of the examinee's records. The physicians' wprk sheets with the names of the men examined are kept by the Finance Corps for ten years.

During the last two years of my command at Fort Hamilton, the civilian or military medical officer employed by the station was required to comment upon any statement submitted by the examinee attesting to his medical or mental condition. After the examinee had been medically examined, including psychiatric examination where necessary or indicated, the medical files and all statements made by examining physicians and special consultants such as psychiatrists or orthopedic surgeons were reviewed and analyzed by one of the U. S. Army Medical Corps officers assigned to the station. The results of the medical examination or check were then recorded by the station medical officer on the examinee's medical records with the comments "qualified", "disqualified", or "temporarily disqualified" for military service.

BEST COPY AVAILABLE

If the examinee was an applicant for enlistment, his papers were forwarded to the service concerned; if the man was unqualified for enlistment, his papers were forwarded to his selective service board. Selective service medical examinations were of two types: pre-induction, and induction. In addition, selective service registrants were examined on an occasional basis for specific ailments at the request of their selective service board or selective service headquarters. If an individual was being examined for a specific ailment but had not been medically examined within a year, he was first given a complete general medical examination, and if found qualified for service, then examined by a specialist employed by the station to examine all persons presented to him claiming or appearing to have medical defects within that specialist's area of specialization, i.e., psychiatry, orthopedics, cardiology, etc. In all cases, the U.S. Army physician assigned to the station reviewed all medical evidence and determined whether the man was qualified, disqualified, or temporarily disqualified for military service.

During the first half year of my command, the station averaged 300 complete medical examinations per day, Monday through Friday. Saturdays and Sundays were not utilized. Following the bombing of the Examining Station at Whitehall, Manhatten, my station was assigned the responsibility of medically examining virtually all selective service registrants in the Long Island and New York City areas. This increased our work load from 300 tonbetween 600 and 700 complete medical examinations per day. Additionally, the work load was increased from approximately 75 to 100 enlistment or induction examinations of a cursory nature to ensure freedom from contageous diseases and new defects to approximately 200 spot checks per day. Any new defects or claims of defects resulted in a complete medical examination, or an examination by a specialist or a number of specialists to ascertain whether the individual was qualified for military service. Regardless of statement or intent of the regulation to conduct unbiased medical examinations, the machinations of a number of selective service registrants attemting to avoid induction when actually qualified, and submitting statements by physicians who were known to be prone to misstate the results of their examinations, the governing trend of station personnel was to regard all medical evidence submitted by the examinees and all claims by the examinee with a great deal of suspician and disbelief.

Selective service registrants ordered to the station for examination or induction would appear on the day assigned to their draft board. Virtually the only men not appearing with their draft boards swgroup were those brought to the station or sent to the station by the Federal court system, or by the FBI as draft dodgers sent to the station to determine their qualifications for military service and to offer them the choice of immediate induction or sentencing by the court for draft evasion. Cases involving appeals to the New York City selective service headquarters were handled by reviewing the individual's records at the city headquarters and then scheduling the man for examination by a specialist at the station along with other members appearing with his draft board on its scheduled day for forwarding registrants.

In the actual conduct of the medical examination, it was a highly mechanized and routinized procedure to ensure that the examinee was completely examined and given the various medical checks required by medical technicians prior to being seen by a physician. These checks included height, weight, vision, hearing, urinalysis, and other medical tests. Following this, the examinees were routed by the station medical NCO to whichever physician had the shortest line of examinees in front of his door. Physicians were required to give general medical examinations to between 25 and 50 men per day, depending upon the avilability of physicians. Following the man's medical examination, he was seen by one of the station Army medical officers to see if he had been completely examined, or required a specialist to check a particular medical problem. If such was the case, the examinee was then routed to whichever specialist had the fewest cases to examine. A specialist normally examined between eight and twelve men in his specialty per day, depending upon the availability of specialists, and the number of those requiring examination by that type of specialist. During the period following the Whitehall bombing and until nearly the end of the large-volume medical examinations in 1971, we employed as many as ten psychiatrists, eight to ten orthopedic specialists, one cardiologist, at least one surgical specialist, and generally 15 to 20 general practitioners on any given day. We depended upon their available time, and a particular doctor's time of arrival was not very predictible. Due to the large number of men being processed, once the individual entered the medical examination section of the station it was impossible to predict which technician or medical specialist would check or examine the individual. The large number of men being examined and the length of time each physician took to examine his quota of examinees engendered a random basis of selection of examiner.

The medical records of all men examined at the Fort Hamilton AFEES were kept on file at the man's draft board or at the centralized records storage facility maintained by selective service. The physicians' work sheets listing the men they examined are on file at the U.S. Army Finance Center or one of its subsidiary records depositories. The records of any man examined at the Fort Hamilton AFEES with the examining physician's statement and examinee-supplied statements can be easily and rapidly reviewed and cross-checked with the Army Finance Corps records of each examining physician's work load for the day. Most of the Army medical officers and the Army-employed civilian medical examiners are still living and working in the New York City metropolitan area, and are available for questioning.

I believe that all of the chief medical officers and junior medical officers assigned to the Fort Hamilton AFEES and all the civilian medical practitioners employed there would be delighted to testify in this case to clear the name of an innocent man.

Robert C. Wiard, Jr.
LTC USA
Retired

AFFIDAVIT OF LIEUTENANT COLONEL WILLIAM MAC PHAIL IN SUPPORT OF MOTION

# A F F I D A V I T



STATE OF New York )
)
COUNTY OF Kings )

I, Lieutenant Colonel William MacPhail Junior, Commands Armed Forces Examining and Entrance Station, Building 116, Fort Hamilton, Brooklyn, New York 11252, being duly sworn depones and says that:

A major part of the mission of the Armed Forces Examining and Entrance Station (AFEES), Fort Hamilton, Brooklyn, New York, during the period 1966 thru 1972, was to determine the mental and physical qualification of registrants referred to the station by City and State Selective Service Systems. New York City Selective Service Office, located at 26 Federal Plaza, New York City, New York, ordered registrants from Kings, Queens, and Richmond Counties to this AFEES. The New York State Boards, located in Albany, sent registrants from Suffolk and Nassau Counties. The City and State systems worked independently of one another and their input to the station was coordinated by the AFEES Processing Officer. Approximately three hundred registrants per day were examined at this facility during the aforementioned period. Peak workloads of up to seven hundred and fifty per day were accomplished during the period October 1969 thru 21 April 1970 due to the temporary closure of the AFEES, 39 White Hall Street, New York City, New York. To support the medical examining workload the station had twenty enlisted and civilian medical technicians and three medical corps doctors assigned. Additionally, twenty one civilian "Fee Basis" Physicians were available on call as needed depending upon workload. When examinations exceeded 90 to 125, additional Doctors were called in on the basis of one per forty exams. Due to the civilian doctors schedule, emergencies, operating room schedules and other factors not controlled by this station, we rarely knew which doctor would be available on any given date. A registrant reporting to this AFEES for his pre-induction physical would be met at the lobby by the Reception and Orientation Staff. He would be issued a packet of necessary forms to accomplish his processing, given an initial briefing consisting of details concerning his processing day, and then was escorted to the test section. A one hour Armed Forces qualification test was then administered. Upon completion of the test the registrant was given a medical orientation, a medical history form was filled out and all registrants began a complete physical examination. If a registrant failed to complete the physical examination and departed the station he was reported to his local board as an "eloper" and was held in violation of the Selective Service Law. Registrants having medical evidence or medical documentation from their private physicians, hospitals or any other source were told to hold such evidence until completion of the entire physical and to present it to one of the military doctors at the final profiling station. Upon being presented medical evidence the medical officer would review it along with the findings of the completed physical. If a decision could not be made (normally the case since all AFEES military doctors were General Practioners) the case was referred to one of the civilian consulting specialists available to this station. Upon completion of the consultants examination a recommendation concerning the registrant was made to the medical officer. The findings and recommendation of the consultant were then measured against the Induction Medical Standards listed in Army Regulation 40-501 and a decision to qualify or disqualify was made based upon these standards. At no time were registrants arbitrarly

excused or released from the medical section prior to completion of the examination. When the registrant had completed all processing phases within this station he was informed that he would be notified by his local board of his status. This station had five working days to complete all administrative work and forward the results to the local boards. The local boards upon review of all information provided by AFEES made the final classification decision concerning each registrant.

I have read the above statement, consisting of two pages, and it is true and complete to the best of my knowledge and belief.

Subscribed and sworn to
before me at Fort Hamilton
on this 18th day of June 1975.

William W. Allen
(Affiant's Signature)

William W. Allen
WILLIAM W ALLEN
Captain, USAF
Adjutant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| -against- | : | 74 Cr 928 |
| WILLIAM SANGEMINO | : | 75 Cr 127 |
| Defendant. | : | |

STATE OF NEW YORK )
) SS.:
COUNTY OF NEW YORK )

MARGARET ARLENE SANGEMINO, being duly sworn, deposes and says:

1. I am the daughter of Major and Mrs. William Sangemino. I was born on July 18, 1951 and presently reside at 57-12 160th Street, Flushing, New York.

2. I graduated from High School in the Spring of 1969 and on July 21, 1969, commenced employment in a clerical position with American Airlines at 633 3rd Avenue New York, New York.

3. My duty station was transferred to LaGuardia Airport on December 23, 1972, and in May of 1973, I was promoted to the position of ticket agent. I retain the same position and duty station to the present.

4. I was present at the Federal Court during April 1975 while my father, Major William Sangemino was on trial. During this trial there was testimony that my father was given a free trip and returned it only because my mother was sick. I asked, rather begged, Mr. Brett-schneider to allow me to testify on my father's behalf. I wanted to testify that a fringe benefit of working for an airline is the free travel provided for the employee and her family. If allowed to testify I would have stated that in 1970 I was entitled to two "Trip Passes"

good for one person anywhere in the "American System", and one vacation pass a year; good for anywhere in the world for myself, mother and father. In 1971, I was entitled to three trip passes and one vacation pass, in 1972, four trip passes and one vacation pass, in 1973, five trip passes and one vacation pass and in 1974 six trip passes and one vacation pass.

5. During the course of my employment I have ~~never~~ used all the passes to which I was entitled. I always offered trips to my parents and they have never taken advantage of this privilege. A basic reason for this was the fact my mother is afraid to fly and in fact she has never flown. I wanted to bring this point out so the jury would understand that my father had the ability to fly about the country without Nathan Lemler and that the tickets given would certainly never have been solicited. The return of those tickets given without solicitation certainly does not establish any illegal conduct on my father's part.

Margaret Arlene Sangemino

MARGARET ARLENE SANGEMINO

Sworn to before me this
23rd day of June, 1975.

Marshall Beil

MARSHALL BEIL
Notary Public, State of New York
No. 31-9820874
Qualified in New York County
Commission Expires March 30, 1976

I, ERIC F. PALMER, being duly sworn, depose and say:

1. I reside at 83-05 Northern Boulevard in Jackson Heights. I have been employed by American Airlines, 405 Lexington Avenue, for the last eight years, except for one brief interruption in 1972.

2. In May, 1964, I was issued a 3-A selective service classification. This is a hardship deferment, necessary in my case because I was responsible for the full support of three dependents, including my mother, grandmother, and brother. I held this classification from 1964 through May, 1970.

3. In May, 1970, due to my failure to submit required annual deferment forms, I was informed that I had lost my deferment classification, and that I was due to be inducted on June 8, 1970.

4. In attempting to have my case re-opened, I was given a hearing at my Long Island City draft board, where I was informed that matters were out of their hands. I was anxious to find another remedy at some higher level, and my draft board made an appointment for me the next day at the Federal building in Manhattan. I was directed by the draft board to speak to Major Sangemino.

Major Sangemino reviewed my draft history and suggested that perhaps I had let my deferment papers lapse in order to free myself from the responsibility of supporting my family. I insisted that this was not the case, that I had merely been negligent, and that my family would suffer greatly if my deferment were not restored. Major Sangemino then called Mrs. Oldford at the Long Island City draft board. He verified the fact of my prior deferred status, and also that nothing in my personal or family situation had been altered so

as to warrant a change in my draft classification. The Major advised Mrs. Oldford that he would request the New York City Director to temporarily postpone the induction order for one month to allow the draft board to review the facts. Major Sangemino did not have the authority to postpone the induction order himself, and only a letter from the Director to the local draft board could re-open my case. The final determination on the reinstatement of my hardship deferment would be made by the Long Island City draft board, upon review of my entire file from the period 1964 to the present. This was the full extent of the Major's effort on my behalf.

5. I was informed of Major Sangemino's trial in 1975 by the accident of my assignment for a short period in the same office as his daughter, Margaret. During the trial, I approached the Major's attorney, Mr Brettschneider, and offered to testify as to this limited encounter with Major Sangemino. Mr. Brettschneider declined to call me as a witness, though I felt I could establish Major Sangemino's innocence in my case. He advised the Major, who wanted to call me as a witness, as he had advised me — that he didn't think my testimony would help the case, that in fact my testimony would hurt the Major because the judge was antagonistic already and anything that would further prolong the trial would be detrimental in the long run. Mr. Brettschneider said that he was unwilling to anger or annoy the judge by including my testimony with the remainder of his defense.

6. The extent of Major Sangemino's action on my behalf was to confirm the fact of my prior hardship deferment, and to recommend that the Director postpone my induction, so that a review of my draft status could proceed from normal administrative channels at my local draft board. No money ever passed between Major Sangemino and myself, either directly

or through any intermediary. Neither was there ever any discussion of money or other type of payment. I was prepared to testify to all of the above, and I offered to do so, but Mr. Brettschneider did not care to risk the anger of the court by adding me to his list of witnesses.

Eric F. Palmer

ERIC F. PALMER

Sworn to before me
this 24th day of June,
1975.

Margrione W. El

MARGRIONE W. EL
Notary Public, State of New York
No. 4526372
Qualified in New York County
Commission Expires March 30, 1976

AFFIDAVIT OF JOSEPH WINCKLER IN SUPPORT OF MOTION 457a

**AFFIDAVIT**

STATE OF NEW YORK )
) SS:
COUNTY OF NEW YORK)



I, Joseph Winckler, residing at 67-59(A), 224th Street, Bayside Hills, N. Y., 11364, being duly sworn, deposes and says that:

I have been employed with the Selective Service System, under the current Military Selective Service Act enacted June 24, 1948, since August 7, 1950. In the course of such employment, I have held the positions of Field Auditor, Assistant Chief, Field and Operations Division, Coordinator for the Manhattan Local Board Group, Chief, Field and Operations Division, Manager, Operations Division and my present position as Staff Officer.

During this period of employment, I would say that I had covered all facets of the operations area of the Selective Service System as it applies to local board and state headquarters levels. This would also take into consideration that area of operation as it applied to the processing of registrants to and at, the Armed Forces Examining and Entrance Stations in connection with examinations and inductions, re-examinations and reviews of medical evidence submitted to local boards in connection with claims for physical disability or on those occasions where a registrant may have sought reconsideration of his rejection.

In covering all areas of our operation, I have served as Legal Officer for the New York City Headquarters in matters relating to violations under the Act and the prosecution of such violations by the appropriate United States Attorneys having jurisdiction. On many occasions, I have been called as a witness by both the prosecution and defense to give expert testimony. This could have been in the area of Selective Service violations or such other prosecutions or GrandJury appearances related to other areas outside that of the Military Selective Act.

In the course of my day to day activities with the System, it is not unusual to receive many inquiries concerning the processing of an individual either by the Selective Service System or the Armed Forces Examining and Entrance Stations. Assistance or the furnishing of information in reply to such inquiries is not restricted to those individuals registered under the jurisdiction of this headquarters, that is, the area of the five (5) Boroughs of the State Of New York City. Under the organizational set-up for the Selective Service System there are two States for New York, that for New York City and New YorkState comprising all other areas outside New York City; there are two State Headquarters.

Inquiries could cover any area of the law, rules and regulations as they apply to the Selective Service System and to the Armed Forces Examining and Entrance Stations which are operated under the administrative jurisdiction of the Department of the Army. There is a popular misunderstanding with regard to the Selective Service System and the Armed Forces Examining and Entrance Stations in that most individuals picture them as both being part of the Department of the Army. These are two separate agencies operated independently of each other but who work together in carrying out the intent of Congress as set forth in the Act. The content of our law, rules and regulations as well as those of the Department of the Army, are a matter of public information available to anyone so that the giving of such information in reply to an inquiry would not, in my opinion, violate the law but it part of the everyday activities of all elements of both agencies.

As a representative of the State Headquarters staff, it was my responsibility as well as that of other members of the staff, to thoroughly explore every facet of an inquiry unless it was of a frivilous nature. In the course of such exploration, we many times would develop new information not previously considered by the registrant's local board, which if true, could result in a reconsideration by the local board or the Armed Forces Examining and Entrance Stations. This information would be made available to the local

AFFIDAVIT



458a

boards for their consideration for a possible change in determination of a registrant's classification or for the purpose of having a registrant re-examined by the Armed Forces Examining and Entrance Stations, or for the purpose of having the new medical evidence reviewed by the Armed Forces Examining and Entrance Stations to determine if there would be a basis for their re-examination or rejection of a registrant previously found qualified or disqualified whichever reason served as the basis for re-examination or review.

As I previously stated, the giving or reply to inquiries were not restricted to those individuals registered with New York City Local Boards. Where such inquiries would reflect registration in some other jurisdiction, we would of course refer the inquiry to the proper jurisdiction and advise the person who submitted the inquiry of our referral and advise them to contact their own local board or the appropriate State Director. However, if the inquiry was one without Selective Service identity, we would reply giving such information as was available under our rules, regulations and the regulations of the Armed Forces Examining and Entrance Stations as related to the processing of individuals for enlistment or induction. However, under no circumstances to my knowledge, would a member of any state headquarter's staff, intervene directly on behalf of a registrant either in his state or another state, without going through the channels of furnishing the information to the local board, or to the appropriate state Director if so indicated. I would venture to say that any such effort would soon come to the attention of the appropriate state Director and he would soon be heard from regarding such intervention,

In terms of such intervention with the Joint Armed Forces Examining and Entrance Station people, I consider that such intervention would soon come to the attention of the Chief Medical Officer and the Commanding Officer at the Station and the State Director concerned would soon hear from that source. There are just too many checks and balances in processing at both agencies one to have anything unusual about their processing not come to the attention of the authorities concerned.

In the recent case where Major William Sangemino was indicted and convicted, I was subpoenaed as a witness for Major Sangemino by his attorney. I had but a brief five minutes or so with him prior to the date of my appearance but there was no depth of inquiry regarding any technical questions regarding our operation or that of the Armed Forces Examining and Entrance Stations and my knowledge of such operations. At that time I did not think that this was significant since having been subpoenaed on many occasions, I was of the opinion that once on the stand, I would be thoroughly questionned concerning my knowledge of the System gained over the many years I have been with Selective Service. To my complete surprise and shock, I was on the stand but for a brief period, much of which was spent in exploring the semantics to describe the physical standards used by the Armed Forces Examining and Entrance Stations to accept or disqualify a registrant; most of the effort to straighten out an acceptable explanation to the court was by Judge Brient, the presiding judge. Major Sangemino's attorney did not pursue many facets of my knowledge which I felt would have been important to his defense. It would seem to me that he would have literally "picked my brains" to thoroughly have both the judge and jury understand the checks and balances in the processing of any registrant; and the difficulties in attempting to influence the outcome of any case by direct intervention of any individual inside or outside of the System.

Not only was I surprised by the lack of exploring my knowledge, but I was equally surprised by the lack of witnesses from the Armed Forces Examining and Entrance Stations, New York State employees who would be involved in the areas having jurisdiction over the registrants on whose behalf there was alleged intervention. While I have not read the transcripts of the trial, it was my information that there seemed to be a total lack of expert witnesses who could have testified on behalf of Major Sangemino.

I do not, and will not believe, that Major Sangemino was ever involved in any improper intervention on behalf of any registrant. I have worked with him,

he has worked under my supervision, and I have found him to be an honest hard working individual with a real and deep interest in people and their problems. If he is guilty of any charge, it must be that of wanting to help people in anyway that he can but certainly not in violation of any law, rule or regulation. From my knowledge of Bill Sangemino over the years of his association with this headquarters, I have found him to be person of high integrity and honesty; a devoted husband and father and one who certainly would not bring shame upon his family by any improper action. I am certain that time will prove his innocence beyond any reasonable doubt and that he will once again walk with his head high and proud of his acquittal of this terrible charge. It is most unfortunate that the hurt to he and his family can never be erased and they must bear the scars of the wounds brought on by their terrible experience.

I have read the above statement, consisting of three pages, and it is true and complete to the best of my knowledge and belief.

Subscribed and sworn to
before me at New York,
N. Y., this 21 th day
of June 1975.

LOUIS J. SOSCIA
Notary Public, State of New York
No. 24-4524063
Qualified in Kings County
Commission Expires March 30, 1976

Joseph Sinatra
(Affiant's Signature)

AFFIDAVIT OF ARCHIE SPIEGELMAN IN SUPPORT OF MOTION



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-against- : 74 Cr 928
75 Cr 127

WILLIAM SANGEMINO, :

Defendant. :

----------x

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

ARCHIE SPIEGELMAN, being duly sworn, deposes and says:

1. I am the [illegible] Spiegelman who testified on behalf of the defendant [illegible] in United States v. William Sangemino, [illegible].

2. I am employed as an [illegible] supervisor for the Selective Service System at [illegible] Avenue, New York, New York. Between [illegible] and October 1969, I was a liaison representative for the Selective Service System at the Fort Hamilton Armed Forces Examining and Entrance Station (AFEES).

3. I have known William Sangemino since his entrance into the Selective Service System in 1968. Subsequent to his indictment in the case September 29, 1974, I offered to testify as a character witness on his behalf.

4. Approximately one month before his trial I spoke on the telephone with Mr. Joel Brettschneider, the attorney for William Sangemino, who indicated he wished to use me as a character witness at the trial. Mr. Brettschneider said he would contact me at a later date.

I assumed this contact would be to discuss the areas he wished me to testify about. This has been the usual procedure in the approximately twenty cases in which I've appeared as a prosecution witness. I have been qualified as an expert in Selective Service matters in prosecutions before several Judges, in the Southern District of New York, including this Court. 461a

5. I did not hear from or have any contact with Mr. Brettschneider again until the morning of April 14, 1975, the day the defense began presenting its case at which time I saw Mr. Brettschneider in the hallway outside the courtroom where he was interviewing several witnesses in addition to myself. Our conversation concerning my testimony did not last over five minutes. This was the first time I learned I was not going to be called only as a character witness for Major Sangenino.

6. I explained to Mr. Brettschneider my duties at the examining station and why I was a witness for Major Sangenino in that capacity.

Mr. Brettschneider asked me about bizarre incidents which happened at the examining station. He said it was good to introduce levity into the trial. I said if you think it will help, I will relate those stories. I agreed to do this despite my own embarrassment about relating those stories in public and reservations about the relevance of this testimony to the charge before the Court. Mr. Brettschneider was insistent that I relate the story about the man who was rejected for psychiatric reasons because of his fetish for cats. At no time did Mr. Brettschneider prepare the substance of my testimony.

7. I wanted to testify that it was common for registrants or their representatives seeking advice to contact Selective Service Headquarters at 26 Federal Plaza for information. Registrants would apprise personnel



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at headquarters of physical problems which they thought might disqualify them from military service. This was done in many instances to insure consideration of the problem at the AFEES station and not be overlooked in an assembly-line induction process. Headquarters, if apprised of certain medical problems would call the AFEES station to make sure the individual was examined by the correct medical speciality to ascertain the validity of his claim. When I received such a call, from anybody, I would take the registrant to any one of the three chief medical officers (CMO) on duty who would review the medical evidence and make out a consultation sheet for the man and attach it to his papers to make sure the registrant received the proper consultation. The registrant then went through and after the initial determination was made the file was again reviewed within three or four days by any one of the three CMO before being returned to the local board. However, in 1 of the cases, where the registrant was considered violent or dangerous he was sent immediately to a psychiatrist. I wanted to further testify that Major Gangemino never asked me to take a man out of this normal procedure nor was I ever requested to have a registrant see a particular Chief Medical Officer or Doctor on duty.

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8. In June 1974, Assistant U.S. Attorney George Wilson asked me to see Mr. Harris about some file. I was not told, until I arrived at Mr. Harris' office the purpose of my reviewing the file. At this meeting there were two other men who I assumed to be connected with law enforcement. At this meeting, I was asked to review a [redacted] Selective Service Files and render an opinion why this registrant was not inducted into the Armed Forces and let them know in my opinion, if there was anything in the file that would indicate

the man was improperly kept out of military service. Of these files, all were proper on their face save for one which appeared questionable to me. My inability to find obvious improprieties in all but one of the files seemed to upset the prosecutor and his staff very much. One of the men, not Mr. Harris, was insistent that I find improprieties in the files and was quite upset when I did not.

In taking the witness stand I fully intended to bring all of the above facts to the jury's attention. All these facts are relevant in considering the feasibility of fixing a selective service case at the examining station level. However, Mr. Brettschneider never spent enough time with me to learn the extent of the substantive testimony I could give nor did he ask me the questions necessary to elicit these answers. His overriding concern was to inject levity into the case and not to direct my testimony to the above issues. I have testified in at least twenty federal trials and never have I been subjected to such shoddy and haphazard trial preparation by an attorney. I have felt from the moment I left the witness stand that my testimony was incomplete because of Mr. Brettschneider's lack of knowledge of the scope of what I could testify about.

Sworn to before me this
24th day of June, 1975.

Marjorie W. El

MARJORIE W. EL
Notary Public, State of New York
No. 45263

AFFIDAVIT OF EVELYN COHEN IN SUPPORT OF MOTION



I, Evelyn Cohen, make this affidavit stating that I was to appear as a witness in the trial of United States v. Major William Sangemino, but was never properly interviewed or prepared for my appearance as a witness by Mr. Brettschneider.

I was never told what areas the questioning would concern so that I would be adequately prepared to give a complete and truthful account of my working association with Major Sangemino.

I was prepared to testify that the relationship between Dr. Lemler and Major Sangemino, witnessed by me, was open and above board. Point of fact, Major Sangemino's door was always open during Dr. Lemler's visits. However, this question was never asked of me during the trial.

I met Dr. Lemler three or four times during the 18 month period I worked for Major Sangemino, as his secretary, and at no time did I ever witness any unusual, secretive or irregular conduct on the part of Major Sangemino.

Dated: July 20, 1975

Sworn to before me this
20th day of June, 1975.

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4601966
Qualified in Kings County
Commission Expires March 30, 1977

Evelyn Cohen

EVELYN COHEN
8121 20th Avenue
Brooklyn, N.Y. 11214

AFFIDAVIT OF ALDO D'AMBROSI IN SUPPORT OF MOTION June 23, 1975



A-F-F-I-D-A-V-I-T

I ALDO L. D'AMBROSI, AN EMPLOYEE OF THE SELECTIVE SERVICE SYSTEM, ON BEHALF OF MAJOR WILLIAM SANGEMINO, USAR, DESIRES TO TO DECLARE THE FORGOING STATEMENT.

HAVING APPEARED AT THE TRIAL OF MAJOR SANGEMINO AS A WITNESS IN HIS BEHALF, I FELT THAT THE ATTORNEY FOR THE DEFENSE DID NOT QUESTION ME ON THE WITNESS STAND TO THE EXTENT THAT MY TESTIMONY WAS OF NO VALUE IN ASSISTING THE JURY IN MAKING A PROPER EVALUATION. MY FIRST AND ONLY ENCOUNTER WITH THE MAJOR'S ATTORNEY WAS THE BRIEF INTERVIEW CONSISTING OF A COUPLE OF MINUTES IN THE CORRIDOR IN THE NEAR VICINITY OF THE COURT ROOM PRIOR TO COMMENCEMENT OF THE TRIAL AND, ON TWO OR THREE OCCASIONS WHEN THE COURT WAS IN RECESS HE WOULD ASK ME A REPETIVE QUESTION AND THEN JOIN SOMEONE IN ANOTHER CONVERSATION. IT WAS MY CONCLUSION THAT THE MAJOR'S ATTORNEY WAS INSUFFICIENTLY KNOWLEDGEABLE CONCERNING MY DUTIES AS A LIAISON REPRESENTATIVE WITH THE ARMED FORCES EXAMINING & ENTRANCE STATION (AFEES), AT FORT HAMILTON, BROOKLYN, NY. THERE WERE QUESTIONS NOT ASKED OF ME THAT I FELT COULD HAVE BEEN ADVANTAGEOUS TO MAJOR SANGEMINO'S DEFENSE. AN EXAMPLE OF A QUERY NOT MADE, " WERE OTHER REGISTRANTS REFERRED TO YOUR OFFICE AT AFEES BY OTHER STAFF MEMBERS OF NYC SELECTIVE SERVICE SYSTEM". MY REPLY WOULD HAVE BEEN AFFIRMATIVE WITH THE FOLLOWING INFORMATION HAD I BEEN ASKED. THE NAMES OF THE STAFF OCCASIONALLY INDICATING THAT THEY BE INFORMED OF THE RESULTS OF QUALIFICATION AND/OR DISQUALIFICATION. THE MAJOR UTILIZED HIS BUSINESS CARD WITH MY NAME INDICATED ON THE REVERSE SIDE OF THE CARD. MY NAME IS OFTEN MISS-SPELLED AS WELL AS MISSPRONOUNCED AND I CAN ONLY CONCLUDE THAT IT WAS DONE AS A MATTER OF CONVENIENCE FOR THE REGISTRANT. WHEN A REGISTRANT WAS REFERRED BY OTHER STAFF MEMBERS MY NAME APPEARED ON A PIECE OF PAPER OR WAS SCRAWLED ON AN ENVELOPE THAT A REGISTRANT WAS CARRYING. I WAS ALSO ON OCCASIONS TELPHONICALLY ADVISED BY THESE INDIVIDUALS THAT A CERTAIN REGISTRANT WAS GOING TO REPORT TO MY OFFICE PRIOR to PROCESSING AND EVEN WHEN A REGISTRANT WAS UNDERGOING PROCESSING. AS FOR THE MAJOR'S BUSINESS CARD, I CONSIDERED INSIGNIFICANT THAT I SOMETIMES THREW IT IN A WASTE PAPER BASKET OR RETURNED IT TO THE REGISTRANT. THIS ALSO APPLIES TO THOSE REGISTRANTS THAT PRESENTED TO ME, MY NAME ON A PIECE OF PAPER.

I HAVE BEEN EMPLOYED BY THE SELECTIVE SERVICE SYSTEM SINCE JUNE 1, 1970 TO PRESENT. UPON RETIREMENT FROM THE U.S. ARMY AFTER MORE THAN TWENTY EIGHT YEARS OF SERVICE WITH AN UNBLEMISHED RECORD. I EMPHATICALLY WOULD NEVER PERJURE MYSELF TO ASSIST AN INDIVIDUAL OF ANY WRONG DOING. MY FIRST CONSIDERATION IS, AND ALWAYS WILL BE TO MY FAMILY, NOR WOULD I PUT MY REPUTATION AT STAKE.

Aldo L. D'Ambrosi

ALDO L. D'AMBROSI

6/23/75

MICHAEL DICKMAN
Notary Public, State of New York
No. 24-6024675
Qualified in New York County
Commission Expires March 30 1976

Michael Dickman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA

-against-

No. 74 Cr 928
75 Cr 127

WILLIAM SANGEMINO

- - - - - - - - - - - - - - - - - - - - - x

WILLIAM SANGEMINO, being duly sworn, deposes and says:

1. I am the same William Sangemino who was the defendant in United States v. William Sangemino, 74 Cr 928, 75 Cr 127.

2. I am an active duty officer, assigned to the Selective Service System at New York City Headquarters, 26 Federal Plaza, New York.

3. This affidavit is submitted in support of a motion for a new trial, on the grounds that my representation at trial by counsel, Mr. Joel Brettschneider, was inadequate, and that his assistance was so ineffective as to have denied me the fair trial to which I was entitled.

4. I retained Mr. Brettschneider after he was recommended to me by Mr. Bernard Fromartz, Esq., an attorney who shares offices with Mr. Brettschneider. Mr. Fromartz accompanied me to an interview with Mr. Harris in September of

1974. At that time, the evidence against me was discussed, and Mr. Harris announced that he was about ready to indict me. Mr. Fromartz told me that he could not take the case because he does not try criminal cases, but that Mr. Brettschneider might be available. I inquired about Mr. Brettschneider's qualifications and Mr. Fromartz informed me that although Mr. Brettschneider did not have much federal court experience, he did have experience in other criminal cases. Mr. Fromartz opined that since he felt I was not guilty, and since he felt the government's case to be extremely weak, Mr. Brettschneider should be able to handle my defense. Shortly thereafter, Mr. Fromartz informed me that Mr. Brettschneider would take my case. I have no savings and was several thousand dollars in debt, and the $1,500 fee offer made by Mr. Brettschneider was one which I found most agreeable, in view of Mr. Fromartz's advice that the normal fee for this type of case would be quadruple that figure. Mr. Fromartz then retained Mr. Brettschneider for me.

5. Subsequently, I met Mr. Brettschneider and we began to prepare my defense. For the first few months, most of my conversations were with Mr. Fromartz, as Mr. Brettschneider was not available to meet with me. I would converse with Mr. Fromartz, who told me that he would relate the substance of our conversations to Mr. Brettschneider. During this time, my own personal discussions with Mr. Brettschneider averaged approximately one hour

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per week. During the three months prior to my trial, our time spent increased to approximately two hours per week, which included time spent with Col. Akst at New York City Headquarters, who attempted to explain the operation of the Selective Service system to Mr. Brettschneider.

6. I instructed Mr. Brettschneider to call Nick DeMaria, whose testimony would refute my involvement in any compassionate or hardship discharges. Col. DeMaria was not called because Mr. Brettschneider felt he was influential in compassionate reassignments and hardship discharges, and the jury might draw a negative inference from my professional association with him. Also, Mr. Brettschneider felt that there might be some confusion in the jury's mind between the names of Nick DeMaria and Col. Nicholson of the Pentagon. I asked to call Col. Nicholson, but no effort was made to locate him. I instructed Mr. Brettschneider to call John Brokaw, New York State Director of Selective Service, to refute my substantive involvement in any New York State case. Mr. Brettschneider declined to call him as he felt that Col. Akst would bring out whatever information that Col. Brokaw could provide. I asked Mr. Brettschneider to call Mr. Grissi, another AFEES liaison agent who was mentioned in the 3500 material, to show that none of the AFEES liaison agents ever acted in conspiracy with me. Mr. Brettschneider felt that the testimony of others would cover whatever Mr. Grissi could have added. But Mr. Grissi was specifically named in the 3500 material, and I was anxious that he should be called. I asked that Mrs. Dahl be called as she,

too, was mentioned in the 3500 material, to show that she never sent Lemler to me or acted in conspiracy with me. Mrs. Dahl was not called because Mr. Brettschneider felt that the defendant is not required to prove his innocence. I also wanted Irene Johnson, Chief Clerk of the Far Rockaway local board, and who was also mentioned in the 3500 material, to verify that she never acted in conspiracy with me. I spoke to Mrs. Johnson on the telephone, and she denied any knowledge of Nathan Lemler. Mrs. Johnson was not called for the same reason as Mrs. Dahl. I wanted to call Lt. Col. Robert Wiard, AFEES commander during that period, who would have testified that such large scale interference in the classification process would have resulted in utter chaos in the Selective Service system. Mr. Brettschneider felt that Col. Wiard would be difficult to find, since he had been discharged by that time, and Mr. Brettschneider reasoned that Col. Akst and the three liaison agents could supply information about AFEES. I asked Mr. Brettschneider to call Lt. Col. McPhail, current commander of AFEES, who would have added emphasis to Col. Wiard's statement. Mr. Brettschneider felt that Selective Service people could testify as to any Army pre-induction and induction procedures, in lieu of an AFEES commander. Mr. Brettschneider was very concerned about prolonging the trial by calling too many witnesses and thereby angering the judge. I named Capt. Benjamin McPherson, Capt. John Dougherty, M.D., and Capt. Goldstein, M.D., Chief Medical Officers, as well. Capt. McPherson was not called because of the expense involved

in bringing him back from Hawaii. Capt. Dougherty and Capt. Goldstein were not called because they would be difficult to locate, having since been discharged. I instructed Mr. Brettschneider to call Bernard Fromartz, Fred Cohen and Edwin Oppenheimer, all attorneys who collectively handled thousands of draft cases. Mr. Fromartz was not called in order not to unduly prolong the trial. Fred Cohen was finally called, but given insufficient notice and he could not testify. As to Mr. Oppenheimer, Mr. Brettschneider erroneously advised me that he was dead. I requested the following character witnesses: Anthony Gennarelli, Anthony Schembri, and Louis Potts, none of whom were called because of Mr. Brettschneider's unwillingness to prolong the trial.

7. I asked and we agreed to call in all 400 registrants referred to in the indictment. This total was later reduced at the urging of the judge. Specifically, I requested Mr. Brettschneider to call Gerald Weiss and registrants Zweibel, Resnick, Crisona, Schwartz, Wuerz, and Richard Falcoff, whose names came up during the trial. These witnesses were not called because Mr. Brettschneider felt once again that it was not necessary for me to prove my innocence. With regard to Richard Falcoff, I felt that it was imperative that we call him since he had testified before the Grand Jury and his Selective Service record was prominent in the prosecution's case. Mr. Brettschneider was unable to locate him. Mr. Falcoff's father, Norman Falcoff, also testified before the Grand Jury, but was not called to testify at trial because Mr. Brettschneider stated

the testimony was not sufficiently relevant to warrant the expense of bringing him to New York from Florida. I also requested that Mr. Brettschneider call my daughter, Margaret Sangemino, my son, Richard Sangemino, and Mr. Eric Palmer. Though my daughter was in court and volunteered to testify, she was not called. My son Richard would have testified that he asked me twice during his basic training to get him out. On both occasions, I advised him that there was nothing I could do for him and to do the best he could to swallow his pride and stick it out. Eric Palmer was also in court and volunteered to testify, but Mr. Brettschneider felt that his testimony, too, would prolong the trial and anger the judge. Finally, I asked that we locate Rabbi Rubin, but he, too, was neither located nor called.

8. It was my belief that if we could discredit Lemler's claims of my success in 400 out of 401 cases, then such discreditation would carry over into his testimony about money payments.

9. The preparation for my own testimony, both for direct and cross-examination, was conducted over a series of short intervals totalling not more than three or four hours. My attorney never went over the questions I would be asked at trial, nor did he advise me on how to articulate my answers on direct examination. Furthermore, he failed to counsel me as to what to expect on cross-examination. As a result, I was ill-prepared and uncomfortable during my testimony.

10. During conversations with Mr. Brettschneider in preparation for my testimony at trial, I [illegible] that I had eight conversations with Nathan Lemler after [illegible] released from prison. As it later turned out, the last three of those conversations had been taped. Although it was nearly impossible to deal with the taped conversations without [illegible] forth the unrecorded meetings which had occurred earlier, Mr. Brettschneider counseled me to testify that there had been only a phone call and a lunch prior to the three taped conversations. The purpose of this, Mr. Brettschneider explained, was to preclude the jury from inferring a [illegible] with Lemler from the frequency of our conversations.

11. For all the above-mentioned reasons, I believe I was denied effective assistance of counsel at my trial. I, therefore, felt it necessary to terminate the services of Mr. Brettschneider and retain Mr. Pollack for the duration of the proceedings in this matter. Mr. Brettschneider exhibited a callous disregard for my wishes in his failure to call the witnesses I suggested; he was deficient in the pre-trial preparation of the case; he failed to produce the testimony of all favorable witnesses from the most remote source for whatever [illegible] own testimony, as defendant. Finally, the trial transcript reveals a wide evidence of incompetence in the conduct of the trial. I pray that the court will review the entire record and grant me the opportunity for a fair trial.

[signature]
WILLIAM [illegible]

Sworn to before me this
[illegible] day of [illegible], 1975.

[signature]
[illegible]
Notary Public, State of New York
No. 43[illegible]
Qualified in New York County
Commission Expires March 30, 19[illegible]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

WILLIAM SANGIAMINO,

Defendant.

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STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss.:

AFFIDAVIT

FREDERICK H. COHN, being duly sworn, deposes and says as follows:

I am an attorney at law authorized to practice in the State of New York and admitted in the Southern District of New York. I am not the attorney of record for the defendant, William Sangiamino, nor have I ever acted for him in any legal matter.

I know Mr. Sangiamino professionally for a period of 4-5 years. I was contacted by Major Sangiamino who asked if I would be a character witness for him well in advance of trial. I advised him that I would be happy to do so and that I had in fact volunteered that service to one of his attorneys, Bernard Frommartz, and that all he had to do was give me sufficient notice of the date of my testimony and to have his attorney go over my testimony with me.

During the time that the trial of Major Sangiamino was proceeding, I was contacted on April 14th by the office of Major Sangiamino and they asked me if I could testify the next day. I advised them that I had several court engagements

that day and that because of the short notice, I might not be able to clear my schedule. In fact, on the day in question, April 15th, 1975, I appeared in the following cases which were all prior engagements which could not be broken: United States V. Thompson, Eastern District of New York, before Judge Jack Weinstein, 9:30 in the forenoon and at 2:00 in the afternoon; People v. Steven Friedman, District Court, Mineola, between 11:00 in the forenoon and at 1:45 in the afternoon; United States v. Rubin Fife, arraignment before the United States Magistrate, Eastern District of New York, which required the balance of the day.

Given the short notice, there was no way I could arrange for any other person to cover my schedule, and in all candor, it is not the way I would notify a witness, particularly a professional, as to the schedule for his testimony. Under the circumstances, I never did testify.

Had I testified, however, I would have stated that I had known Maj. Sangiamino in a professional capacity for a period of 4-5 years. That I was an active practitioner during the time of and until the end of the President's power to draft under the Selective Service Act in the Selective Service Bar, where I and others in my firm handled over a period of those years more than 1,000 cases. During the time that I was practicing at the Selective Service Bar, I had occasion to deal with

Major Sangiamino on numerous occasions when appeals that I was taking fell within his purview as Director of Manpower for the Office of the City Director, Col. Paul Akst. That at no time did I feel that Major Sangiamino was interested in anything other than performing his obligation to give every matter a fair hearing and that the basic indicia of someone who is "on the take" was never present and it never occurred to me that Major Sangiamino might in fact be "corrupt." That during the course of the years I had occasion to discuss Major Sangiamino with my brethren at the Selective Service Bar, which was a small and closely knit group of specialists who exchanged information quite freely. Major Sangiamino's reputation among the lawyers who practiced in the field of Selective Service law was high as to his integrity and fairness and that I never, in all the conversations I had about him, heard any hint of his being involved in corrupt practices.

The only reason that I did not testify was because of the inadequate time in which to clear my schedule.

Dated: New York, New York

Frederick H. Cohn

Sworn to before me this
20th day of June, 1975

TERRY E. THORNTON
Notary Public, State of New York
No. 41-4526813
Qualified in Queens County
Commission Expires March 30, 197.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| United States of America | |
| -v- | AFFIDAVIT |
| WILLIAM SANGEMINO, | |
| Defendant. | |

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

EDWIN J. OPPENHEIMER, JR., being duly sworn, deposes and says:

1. Since October of 1974, I have been employed as Director of Litigation for the American Civil Liberties Union Foundation's Project on Amnesty. From September of 1968 to October 1973, I was employed as Coordinator of the New York Civil Liberties Union's Selective Service and Military Law Panel, a voluntary association of attorneys who provided free counsel to young men who found themselves embroiled in legal conflicts with the Selective Service System and the military. Thus, for the past six years, I have been almost totally involved in the coordination of free legal services, first in New York and now nationally, for selective service registrants who claimed to have been treated unfairly by the Selective Service System.

2. In my capacity as coordinator of these services offered by the American Civil Liberties Union Foundation, it has been necessary for me to have frequent contact with various Selective Service System headquarters personnel, both regionally and at the National Headquarters of Selective Service in

efforts to resolve the problems of individual registrants, without resorting to litigation.

3. In assisting registrants who fell under the jurisdiction of New York City draft boards, it was often necessary for me to correspond with, speak with by telephone and meet members of the headquarters staff of the New York City Headquarters of Selective Service, including the defendant.

4. It is my best recollection that since 1968, I have conferred with the defendant on a professional basis, in excess of fifty occasions regarding the cases of registrants whose procedural rights had been violated by their respective draft boards. The bulk of these cases involved claims for III-A, hardship deferments.

5. At no time during my attempts to favorably resolve these cases did the defendant explicitly, impliedly or in any way indicate that he expected any consideration for his efforts. To the contrary, he indicated that it was his responsibility, as was it that of the other members of the New York City Headquarters staff, to insure that local boards were acting equitably in the treatment of registrants within their respective jurisdiction. The defendant's efforts on behalf of our clients with meritorious cases was always forthright and clearly within the lawful parameters of his office. These efforts were remedial in the sense that they sought to compel local draft boards to properly execute the Selective Service Act and regulations.

6. In late March, 1975, I received in the mail a subpoena to testify for the defense from defendant's attorney, Mr. Brettschneider. The return date on the subpoena was

April 7, 1975. Thereafter, during the first week in April, I telephoned Mr. Brettschneider. He told me that I should consider myself on a standby basis to testify. I told Mr. Brettschneider that if my schedule permitted, I would be glad to testify on the defendant's behalf on short notice. Since that conversation of the first week in April, 1975, I have not spoken with Mr. Brettschneider, nor have I ever been contacted by his co-counsel Bernard Fromartz.

7. At all times during the defendant's trial, I was in New York and available to testify to the matters heretofore set forth in this affidavit. In addition, I would have been able to testify to the defendant's reputation for professional integrity amongst Selective Service practitioners and the draft counselling community.

Edwin J. Oppenheimer, Jr.

Sworn to before me this
24 day of June, 1975.

Bella Greene

BELLA GREENE
Notary Public, State of New York
No. 24-1554240
Qualified in Kings County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-v-

WILLIAM SANGEMINO,

Defendant.

: AFFIDAVIT IN OPPOSITION
74 Cr. 928 (CLB)
75 Cr. 127 (CLB)

----------X

STATE OF NEW YORK )
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JEFFREY HARRIS being duly sworn deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and as such have been assigned the responsibility for the above-captioned matter.

2. This affidavit is submitted in opposition to the defendant's motion for a new trial pursuant to Rule 33, Federal Rules of Criminal Procedure.

3. The defendant argues that a new trial is "required in the interest of justice" because he was denied effective assistance of counsel which reached constitutional proportions. This argument lacks merit for two reasons.

4. The evidence against the defendant was so overwhelming that a conviction would have resulted despite the efforts of the most able counsel. A review of the trial record shows that the testimony of Nathan Lemler, the Government's principal witness, was so extensively corroborated as to mandate a conviction. First and foremost, the Government introduced into evidence a tape recording of a

conversation between the defendant and Nathan Lemler. On this highly incriminating tape (Government Exhibit 8) the defendant is heard discussing how Lemler can explain away the notations in his records which show the payment of money to Sangemino. It is quite clear that the jury immediately focused on this piece of evidence since they asked that it be replayed only ten minutes after retiring to deliberate (Tr. 1218).* The Government also introduced other highly incriminating documentary evidence. This included Government Exhibit 4, the defendant's business card which contained a handwritten notation that the defendant was to be called in reference to Resnick, one of Lemler's clients and whose draft board was not within the defendant's lawful jurisdiction. Government Exhibits 3 and 3A, telephone log entries reflecting calls to Lemler by the defendant, were introduced and showed a continuing relationship between the defendant and Lemler. These calls were in reference to Lemler's clients who had selective service problems and additionally in one message the defendant thanks Lemler "for the tickets." (Lemler had testified that he had given Sangemino tickets for an all expense paid trip to Puerto Rico.) The Government also corroborated Lemler with other witnesses. Lemler's chauffeur Charles Mofschowitz testified that in addition to driving Lemler to the defendant's office building on about six occasions, he went there twice himself to deliver

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*Designation Tr. refers to the Trial transcript.

envelopes to the defendant upon instructions from Lemler. On one of these occasions he saw that the envelope contained three one hundred dollar bills. Mofsowitz was shown to be a retired taxicab driver who has no criminal record and no motive to curry favor with the Government. Mofsowitz was himself corroborated by Government Exhibit 11, the sign in log at 26 Federal Plaza, which contained his signature as having entered 26 Federal Plaza to visit selective service. Ruth Mear, another Lemler employee, testified that she brought an envelope, contents unknown, to Sangemino upon the instructions of Lemler. Lemler's daughter, Harriet Tollin testified that she accompanied Lemler to 26 Federal Plaza on about three occasions and that on one such trip Lemler commented upon leaving 26 Federal Plaza that he had to go into the men's room to pay the major. Mrs. Tollin also stated that she had no relationship with her father and in fact had testified against her father at his trial in Nassau County. The evidence clearly demonstrated that she too had no motive to fabricate to either help her father or seek favor with the Government. Another witness whose testimony corroborated Lemler was Lemler's ex-client, Joseph Petro. Petro testified that in addition to travelling to the Pentagon with Lemler, Lemler told him that he would enlist the assistance of the defendant on Petro's behalf, and that Lemler had Petro deliver an envelope to the defendant. The evidence revealed that Petro's case was not within the defendant's lawful jurisdiction.

5. This extremely brief review of some of the Government's evidence demonstrates that the case against the

defendant was substantial. Even the most highly respected defense counsel would have been unable to successfully contend with the voluminous documentary and live evidence which when taken cumulatively literally buried the defendant. It is difficult to conceive of a defense which could have established a reasonable doubt in light of the evidence presented at trial.

6. The defense presented by counsel was adequate and the attacks thereon are the product of 20-20 hindsight outside the courtroom. There is probably no case in which a lawyer could not comb a trial record and second guess the decisions made by trial counsel in the heat of trial. Here the defendant picks several incidents out of a 1200 page trial record and attempts to generalize therefrom. The fact of the matter is that defense counsel cross examined the Government's principal witness Nathan Lemler for the better part of three days. It is beyond question that during this cross examination counsel brought out every shred of material that adversely reflected upon Lemler's credibility. In this endeavor no stone was left unturned.

7. The defendant now claims that his trial counsel, who was privately retained, should have found and called other witnesses. One such example is Richard Falcoff and his father Norman Falcoff. The Falcoffs, who were Lemler's clients, it is now argued would have shown that Lemler had lied about the necessity for fabricating a medical deferment for Richard Falcoff since their testimony would have established that Falcoff had epilepsy and was legally deferrable. This is simply wishful thinking. The testimony of the

Falcoffs before a grand jury (Government Exhibits 3589 and 3590 attached hereto as Exhibits A and B) is to the effect that Richard Falcoff had petit mal when he was nine years old and that he held valid driver's licenses from three states, that on each license he swore that he did not have epilepsy. Specifically Richard Falcoff testified that although he claimed in 1971 to have had epilepsy for the past five years he had not seen a doctor for that condition since 1959; that the family doctor had Falcoff on medication from 1967 to 1971 without seeing him; that although he was given the prescription by his family doctor in 1967 he didn't initially fill it for three years; that he only took 2 pills of 25, threw away the remaining 23 pills and then renewed the prescription but couldn't remember where or when; that he went to Lemler only to gain admission to law school but that most of the phone messages between the Falcoffs and Lemler refer to his draft status, that in fact the last call between Lemler and the Falcoffs was in December 1971 and Falcoff didn't even apply to law school until the beginning of 1972; that when he graduated college in the summer of 1971 he thought that Lemler could get him into law school in September 1971 although he hadn't taken the law boards or applied to any law school; that he told the induction center about his condition the second time he was examined because he felt this would impede his service to the United States and place him in danger, but that he didn't feel he was placing himself in danger behind the wheel of a car. In sum only a complete reading of Richard Falcoff's grand jury testimony reveals what a disaster he would have been as a defense witness.

8. Further [illegible] testimony is cumulative and not probative. This essence of this case was [illegible] money to a public official by a private [illegible] of his public position. Here, even assuming arguendo that Falcoff had deferrable epilepsy, this would not have overcome the substantial evidence of payments by Semler to Agnew. Further, the true condition of Falcoff is irrelevant because his selective service folder (Government Exhibit [illegible]) shows that Falcoff was to be re-examined in one month, a time he would have to support his claim, and that he was inexplicably never called for re-examination.

9. The defendant also presents affidavits from witnesses who would or did testify. These affidavits are shabby attempts by people who think that the defendant is guilty to try and help him. For example, the affidavit of Robert C. Wiard, Jr. concludes that he would be "delighted to testify in this case to clear the name of an innocent man." There are other affidavits by individuals who did not hear the evidence at trial or who are [illegible] attorneys opining on the quality of their trial preparation and the content of their testimony. These likewise are desperate attempts by well meaning friends to help the defendant and are meaningless.

10. The defendant received a spirited and adequate defense that simply could not overcome the plain fact that the defendant was guilty and the evidence demonstrated that beyond a reasonable doubt.

11. Defendant, during oral argument on his motion, argued that he was entitled to a new trial because the Government had violated its obligation pursuant to [illegible]

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Maryland in that it did not turn over the grand jury testimony or the facts contained therein of Richard and Norman Falcoff until the day before trial. This argument lacks merit.

12. The report of Dr. Pulito dated May 11, 1959 (Government Exhibit 3597 ID attached hereto as Exhibit C) which states that Richard Falcoff may have an "epileptogenic focus" was shown to the defendant on January 30, 1975 and February 10, 1975. Even assuming arguendo that this report was "Brady material" it was furnished to the defendant several months in advance of trial. On the same dates the defendant was shown Falcoff's selective service file (Government Exhibit 6) wherein Falcoff claimed that he had had epilepsy for some five years. Hence, if the thrust of defendant's argument is that Falcoff claimed he had epilepsy at his induction physical and in fact there was a doctor's report that Falcoff had epileptic tendencies when he was nine years old, he had that information on January 30, 1975 approximately two and one half months before trial.

13. The defendant was furnished with copies of Richard and Norman Falcoff's grand jury testimony the day before trial. The Government contends that it had no obligation to provide either of these transcripts under the doctrine of Brady v. Maryland, but did so out of an excess of caution. A reading of these transcripts as illustrated in paragraph 7 above clearly demonstrates that there is nothing contained therein which in any way could be considered producible under Brady. The testimony is merely the crude attempts of the Falcoff's to explain away their involvement

with Lemler. The claim that Richard had epilepsy was supported by the report of Dr. Pulito (GX 3597 ID).* This report was made available to the defendant on January 30, 1975. During the trial, defense counsel stated that the defendant had indeed seen GX 3597 ID pre-trial and had made a written note about it (Tr. 146-7). Counsel again later in the trial stated that the information contained in GX 3597 ID (also marked as Deft. R ID) was available to the defense well in advance of trial (Tr. 1021-22). During the course of the discussion on GX 3597 ID, the Court pointed out that this whole matter was very peripheral (Tr. 1022).

14. In summary, GX 3597 ID was furnished to the defense over two months prior to trial. Falcoff's selective service file was likewise furnished to the defense over two months before trial. The grand jury testimony of Richard and Norman Flacoff was furnished to the defense the day before trial. Defense counsel knew that Falcoff claimed that he really had epilepsy, and that a doctor's report existed which could be interpreted as supporting such a claim (at least when Falcoff was nine years of age). Yet no attempt was made to locate Falcoff until well into the trial, and then only for the purpose of authenticating GX 3597 ID (Tr. 1021-22). Further, as the Court recognized, the whole Falcoff issue was peripheral. The real issue here was whether the defendant took money from Lemler and not the medical condition of Richard Falcoff.

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*Designation GX refers to Government Exhibit.

WHEREFORE, the Government respectfully requests that the defendant's motion for a new trial be denied in all respects.

JEFFREY HARRIS
Assistant United States Attorney

Sworn to before me this 9th day
of July, 1975.

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT:

EXHIBIT A - TESTIMONY OF NORMAN FALCOFF

3589

EJC-1(1) June 24, 1974 Norman Falcoff

Re: John Doe

Reg. Jury Mr. Jeffrey Harris

N O R M A N F A L C O F F, , called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. HARRIS:

Q State your name, please, and spell it. A Norman Falcoff [spells].

Q Mr. Falcoff, before we begin I'd like to advise you of your rights. You have the right to refuse to answer any question the answer to which you think may tend to incriminate you. Do you understand? A Yes sir.

Q Anything you do say could be used against you in a court of law. Do you understand that? A I do, sir.

Q I'd further like to advise you that you have the right to have an attorney present outside the Grand Jury room and to interrupt the proceedings and consult with that attorney if you desire. A Well, I don't have an attorney here with me. I felt I didn't need an attorney.

Q If there did come a time that you did have an attorney and you could no longer afford an attorney, the Court would appoint one for you. A I understand.

Q I'd further like to advise you that your testimony before this Grand Jury is under oath and a wilfully give a false answer to this Grand Jury, that could result in a perjury prosecution. A I understand.

Q I'd further like to advise you that this Grand Jury is looking into violations of the federal criminal law -

specifically conspiracy, draft evasion, obstruction of justice, bribery and false statements to the Government. A [Nods]

Q Now, Mr. Palcoff, did you ever have occasion to meet a person named Nathan Lemler? A I did, sir.

Q Could you tell us the circumstances under which you met him. A I -- I found out about this man through riding on the trains, and I overheard a conversation that some man had a son put into a law school, he got him into a law school, Fordham Law; and I contacted the man and I had a meeting with him regarding this matter, and I paid him a fee and he told me at the time that part of that fee would be a contribution to the alumni association of Fordham University, and he told me that I would receive an acknowledgment of that matter; and I waited about two or three months and I heard nothing at all from the man, and I tried to get hold of him, and at that point there he seemed to be unavailable at all times and he just evaporated and disappeared off the face of the earth, just couldn't get hold of him, couldn't contact him. Then he called me at one point and asked me for Richard to submit his grades to him, and I called Richard long distance and advised Richard to call him and give his grades to Dr. Lemler, and at that point I called him again, I contacted him and just couldn't get hold of him at all. He just disappeared entirely. During our conversation I had with him, the original conversation, he advised -- he wanted to know what status Richard was in, his Selective Service status then. I told him that he had a

student deferment at the time and no doubt in my mind he would be changed into 1-A his senior year, the last six months of school, which eventually did occur; and I told him at that time that I wasn't concerned too much about Richard's Selective Service. I told him he had a medical situation and I wasn't too over-concerned about it; however, I felt that if the doctors at the Selective Service wouldn't accept this documentation that he did have, I would have to seek some appeal somewheres, and -- and he said to me, "Well," he said, we -- we might be able to help you on that matter," and I told him that I had a lawyer, people that are familiar with the Selective Service laws and could help me in various appeals if I had to make an appeal, but that was -- that was the end of the entire time I talked to him until I picked up the newspaper sometime in June of 1972 and there's an article in there that Dr. Lemler was convicted of a section in the state criminal section there, conspiracy to violate, I think, the education law, and at that point there I just -- just took the entire matter as a bad deal there and I just completely forgot about it, and after that, a short time after that, we moved down to Florida and I retired, and I continued to make every possible effort to get Richard into law school. As a matter of fact, I funded him to go to Raleigh, North Carolina. He applied to Chapel Hill down there. I thought if you live down there, you might be able to - maintain a residence status - and he might be able to get in. He did go down there

and he was gainfully employed, he worked for the library. Unfortunately he couldn't gain admittance down there. I went down to see the dean - I happened to be there. There was no chance for him to get in there. There were too many applicants for the amount of chairs they had in there.

Q You mentioned that your son had some medical condition you felt might affect his Selective Service status. What condition is that? A Well, he had the documentation with him. I believe he submitted it to you, Mr. Harris. After that examination, I was in Chicago, and I came back and this thing had occurred. It was a serious seizure at the time while I was away.

Q In what period of time are we talking about now, what year? A This would be the age of ten or thereabouts. He was ten years old at the time. This goes back to fifteen years, pretty close to it, and I've got the documentation with me; and I took him to a Dr. Nathan, which had been our doctor for years and years. He was head of the hospital, Jewish Hospital, and I presented the entire case to him, and he gave Richard a very, very thorough check-up at the time. And I had a meeting with him at the time and he told me, he says, "Norman, " he said, "Look, I've looked him over pretty carefully. There's a touch of it there, and he'll be subject to very light seizures as time goes on. Uh, I would not give him the medication that this man here is subscribing - prescribing, rather." This doctor - I think it's on here [looking

at paper] - Pulito. Never met the man. Dr. Frank Pulito [spells]; and he suggested that we should leave him alone and let nature take its course, and he gave him a very light sedative and told him to carry it with him at all times. A very light sedative. He said it's not as strong as the prescription that this doctor gave him, but, in view of the fact that they're light seizures, he can get over them very fast; and he's been -- he's been -- he's had some light seizures on and off during the last fifteen years. I've seen them, but they're a very, very short duration, and I felt possibly the military might accept him on this basis here. As a matter of fact, he went for his examination down at the army down there, and he came -- he passed it physically. The doctors passed him until he came to the psychiatrist, and he told the psychiatrist that he had a neurological problem, and he asked him if he had documentation to back that up. He told him he didn't have it with him. He told him, "You'll hear from us on the next examination; bring your documentation with you." I don't think he was called again after that.

Q Now, during 1971, when he went down for this physical, was he under medication or treatment at that time? A He wasn't seeing any doctors at the time, but he was subject to very light seizures.

Q Now, you're aware, of course, that your son has a driver's license and has had a driver's license for some nine years? A Yes sir, I do.

EJC-6(1) Norman Falcoff

6-24-74

Q And do you have a valid, or did you at any time have, a valid New York license, yourself? A I've always had one.

Q I'm sure, then, that you're familiar with the application, which specifically asks whether the applicant has had epilepsy fits, fainting spells or the like. Do you know about that question? A Yeah, I think I do. I think I've seen it on the --

Q Do you know what your son answered? A I don't.

Q I'll show you what's been marked as Grand Jury Exhibit 4 this morning, Mr. Falcoff, and just ask you to take a look at it specifically with regard to question one, and then to look at Grand Jury Exhibit 3 and look at question four.

A Where's the qu[illegible]on, sir? I'm trying to --

Q Right over here. A Oh, I see. This one here, yeah. Yeah, I see that. He answered, "No." Right.

Q Now, take a look at Grand Jury Exhibit 3, which is the other document, which is the application for a driver's license in the State of North Carolina. A He answered, "No," again, I assume.

Q Now, is it your testimony that your son was lying in response to these questions? A Well, I -- I would not -- I would not pass judgment on -- on his intent there. I -- I was really concerned all my lifetime to this respect, that in view of the fact that he had -- he had light seizures, very light seizures, and I felt -- I felt that if there were any kind of record, public record, available, it might hinder him

in any endeavor that he may -- he may look forward to. In view of the fact that I'm not a medical man and I can't pass judgment on -- on what could happen to him tomorrow under tremendous stress, I can't -- I can't vouch for that; but knowing this boy as I do, I've seen some of his seizures and I've seen him put his head down for three or four minutes, and he got up and shook his head and he was fine; so that's all I can say.

Q There's no doubt in your mind that your son has had some form of epilepsy? A I would accept -- I would accept this documentation, sir.

Q Now, what was the amount of the fee that Dr. Lemler charged you? A Well, I offered him five hundred dollars on a contingent basis. I offered him, at the time I talked to him, and then I believe we got a call home that wasn't acceptable to him; he wanted the entire amount.

Q What was the entire amount? A Two thousand dollars.

Q And did you pay him that? A We did, yeah.

Q In what form? A In check form.

Q Now, do you recall when you first saw Lemler?
A Oh, might have been sometime in '71, sir. I just don't recollect.

Q '71? A Yeah.

Q Now, do you know your son graduated college in the summer of '71? A I believe so. I imagine so.

Q Are you aware of the fact that he didn't have any

applications in for law school until the spring of '72?
A That's very true. Very true. But one of my -- one of my reasons for stepping into this matter as early as I could, I thought that he might -- I might -- he offered courses at the time, he was an educational -- I don't know what field he was in. He was an expert, and I discussed the possibility of having this boy review some of the Princeton law exams that he would have to take eventually to get into law school; and in view of the fact that he wasn't pursuing some of the courses he should have done in school, pre-law courses, which he never did, I thought it would be a very good idea for him to review some of the Princeton exams with this man here; and this was my main concern - if he studied these things and reviewed them through his office there, which I thought he was set up for all that there, it might help him in gaining a fairly good score in his Princeton exams.

Q What, if anything, did Mr. Lemler do for you in regard to your son's Selective Service status? A Actually, he did very, very little. When he told me he might be helpful, I told him it wouldn't be necessary, based on his physical condition, and I asked him, I pointed the question to him, whether it was a residual benefit he was offering to me in this matter here in case I had to appeal, and he said it might be, and that was the end of it.

Q When was it that your son first met Dr. Lemler?
A He never met him.

Q He never met him? A He never met him.

Q Are you sure about that? A I'l swear, I'll swear over and over again, he never met the man.

Q I'll show you what was marked this morning Grand Jury Exhibit 8. It's an excerpt of a business record of Dr. Lemler - specifically, every phone call by yourself or your son to Dr. Lemler - and I'd like you to look over these phone calls. They're in chronological order. A I don't recollect any of these calls here. Maybe they were made in reference to the possibility that the draft board would not accept his documentation, medical documentation here, and if they were made, they were made for the sole purpose of setting up appeals for him possibly.

[Continued by GH]

June 24, 1974
GH-1
Re: John Doe
June Reg.
Rel.EJC Mr. Harris

Norman Falcoff

Q Now do you know a man named Seymour Terry?

A I do.

Q And who is he? A He's a man that -- he's in business on Seventh Avenue, and he's one of the men that I ride in on occasion -- in on the train, I see him on the train.

Q Did he refer you to Lemler? A I heard the conversation at the time he mentioned it to me.

Q What did he say? A Well, I told him that I was interested in gaining admittance for Richard into law school and he told me he runs an educational system there where he helps a lot of boys to gain admittance into medical schools and law schools.

Q Now, Nathan Lemler gave you a contract, did he not, a written contract? A I don't recollect, I really don't recall whether he gave me a written contract.

Q If he did would you still have it? A I don't think I have. When I moved out to Florida three years ago, two-and-a-half years ago, I destroyed a lot of papers. As far as I was concerned this matter was all finished, I destroyed many papers that I didn't take down with me.

Q Now what efforts did Nathan Lemler make with regard to helping your son, Richard, get into law school?

A Actually he made no effort at all that I know of, I couldn't reach him beyond that point; he was unreachable for the entire period, for six or seven months after that. As a matter of fact I can make a statement right now: I never saw him after that nor ever had a conversation with him.

GH-2

6/24/74

Falcoff

Q And what efforts did he make with regard to your son's Selective Service Appeals? A Well, at that point there, I couldn't reach him at the time.

Q At the point you could reach him, before December of '71? A He made no -- had no discussion about the appeals at that time until he turned 1-A and he came back from school then it dawned on me I ought to see him and discuss the appeals if any were necessary, if the documentation were not acceptable to the Commissioner of Selective Service at the time.

Q Were you ever aware of the result of your son's physical? A He passed the physical with the last doctor he told me.

Q He passed the physical completely. As a matter of fact April 28, he was found fully acceptable to the Armed Forces, were you aware of that? A I'm not aware of that. When he finished with the last doctor, told him to bring documents that would prove he had a neurological problem.

Q He took two physicals? A I think, at Louisvill

Q Louisville? A Yes, yes, he told me he passed. He never presented his documentation.

Q Now as to these phone calls, the one from Mr. Falcoff, you don't recall for example, telling Lemler, Richard had a severe automobile accident while returning to school? A That phone call might have been made by myself or by my wife.

Q And Mr. Falcoff told me that Richard had not received notification April 12. Did you make that call? A I

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don't think-I don't recall that call.

Q Well does Richard have any brothers? A No, he has two sisters.

Q So the Mr. Falcoff was either yourself or Richard? A It could be Mrs. Falcoff.

Q It says Mr. Falcoff? A That I can't --

Q Mr. Falcoff called on June 29, 1971, what's happening with his son in the draft? A What time was that?

Q June 29, 1971, do you remember that? A I don't recollect, I don't recollect even talking to him. I don't think I had a discussion with the man beyond the point of my original meeting with the man, I think I had just one conversation when he called me back and wanted to know -- to talk to Richard on the phone, and asked me what his grades were for the Semester. I don't -- I didn't know -- have Richard call me longline and advise what his grades were and that's the last time I talked to him.

Q Let me ask you, did you ever call his office and leave messages? A I did call.

Q This message, Mr. Falcoff, what's happening with his son in the draft; what's happening again June 21, 1971? A I certainly might have called his secretary at the time. I called her, trying to reach him, to talk to him. I had no discussion with her at all about any matter. This pertained to me particularly I just wanted to talk with him.

Q June the 21st, 1971 with the message, that's obviously you calling, is that right? A Might be.

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Q On that June 29th, for your information your son wasn't classified until June 12, what would that call be about? A I honestly don't recall, I don't recall calling that frequently. I know I called the man a couple of times and couldn't reach him. As a matter of fact I made a half dozen attempts to go there personally, which I did, it was close by our home, a fifteen minuted drive, every time I drove out there the office was completely locked, closed.

Q Now you were aware of the fact your son presently holds a valid Illinois license? A Yes, right.

Q Are you aware a false statement on one of these licenses constitute a crime, are you aware of that? A I do. I think it's wrong but I feel -- I feel that in his particular case he might have some justification in doing what he's doing. I personally had many doubts in my mind whether his condition should be public record in view of the fact that it was a very light form of seizures. Actually it was diagnosed as petit mal at the time by the first doctor; the second doctor diagnosed it as full epilepsy. That's the reason I took him to Nathan.

Q Are you saying it was light enough to be behind the wheel of a car but it was serious enough to not serve in the army? A I'd leave that for a medical man in the Army, I felt the medical men in the Army might not accept this documentation, and if they did not accept the documentation. Naturally I wanted him to have whatever appeal by law he had.

Q What about leaving the documentation to the medical men at the Motor Vehicle? A I don't disagree with

you, sir. I don't disagree with you on that. I don't disagree with you on that. Falcoff

MR. HARRIS: Mr. Foreman, would you ask the witness to wait outside for a few minutes.

FOREMAN: Sir, would you wait outside in the waiting room.

[WITNESS LEAVES ROOM]

MR. HARRIS. Witness: RICHARD FALCOFF

R I C H A R D F A L C O F F , called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. HARRIS:

Q State your name, please, and spell your last name. A Richard Falcoff.

Q Where do you presently reside?

A 1421 Candlelight Court, Peoria, Illinois.

Q How are you employed? A I'm a manager of a retail fabric store.

Q What is the name of that store? A The Remnant House.

Q What's your business address? A It's #1620 West Altorfer Drive, Peoria, Illinois.

Q I'd like to advise you, you have a right to refuse to answer any question you feel may incriminate you. Do you understand that? A Yes.

Q And that anything you say can be used against you in a court of law. Do you understand that? A Yes.

Q That you have a right to have an attorney outside the Grand Jury room, to advise you, and you could interrupt the questioning and speak to him at any time. Do you understand that? A Uh huh.

Q If you cannot afford an attorney, the court would appoint one for you, who would have the same rights as a private attorney. Do you understand that? A Yes, I do.

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Q I would also like to advise you that if you give a wilfully false answer to anything I ask you, that constitutes the crime of perjury. Do you understand that? A Yes, I do.

Q Further, I would like to advise you that you are a potential target of this investigation, which means there is a possibility that the Grand Jury, which is looking into violations of federal law, specifically, conspiracy, bribery, draft evasion, obstruction of justice and false statements to the government; that this Grand Jury may indict you as a result of this investigation. Do you understand that? A Yes.

Q Now, did you ever serve in the armed forces of the United States? A No.

Q Why is it that you did not serve? A I was deferred for medical reasons.

Q MR. HARRIS: I request that that document be marked Grand Jury Exhibit #1 of this date. (so marked)

Q Take a look at that and tell me if you know what it is? A Yes, I know what that is; it's a Selective Service questionnaire.

Q Did you fill that out? A Yes, I did.

Q Will you turn to the page where it's headed, "Physical Condition"? A (witness complies)

Q "Series #11: Physical Condition" - did you make any entries in there? A No.

Q As to the question, "If you have any physical

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"or mental conditi n which in your opinion will disqualify you for service in the armed forces, state the condition." Did you make any response to that? A No.

Q Did you have any condition at the time which you felt would disqualify you? A Yes, I did.

Q What condition was that? A It was Petit Mal, - epilepsy.

Q During the spring of '71, did you or any member of your family have occasion to see a Dr. Nathan Lemler?

A My parents did, yes.

Q What was the reason for their visit to him?

A Well, I was in my third years in college, and they saw him in connection with getting me into Fordham Law School.

Q Did they pay him any money? A I don't know if any money was transacted.

Q Did you or your parents ever have any contact with Lemler regarding your Selective Service status? A No.

Q Did there come a time when you were called to take what is known as a "pre-induction physical" in the armed forces?

A I did.

Q Did you in fact take that physical?. A Yes, sir.

Q Do you recall that when you took your physical there was a series of questions that you answered, or were asked to answer, about physical ailments that you may or may not have had? A Yes.

MR. HARRIS: Request that this be

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marked as Grand Jury Exhibit #2 of this date. (so marked)

Q I show you Grand Jury Exhibit #2, an' ask you if you can recognize the return? There's a second page.

A Yes, I recognize it.

Q Is that your signature? A Yes, it is.

Q In response to question #20,"have you ever had, or do you now have"-- answered one of the questions, - "ep psy or fits" -- you check' "no", is that correct?

A Yes, I did.

Q An ou signed your name under a statement which says, "A false or dishonest answer to any of the questions on this form may be punishable by fine or imprisonment", --- and is that up to the best of your knowledge, --- and your signature appears on that? A Yes.

Q And there's a physician's summary, and it says, "Denies having serious illness", - did you deny having a serious illness? A That, I denied it to the doctor.

Q What was the result of that physical?

A That I was classified #1-A.

Q Did you subsequently have another physical examination? A Yes, I did.

Q Just so we are straight: the date of your first physical, as reflected by Grand Jury Exhibit #2, is April 28th of '71. Now, in November, did you go back for another physical? A In November of '71?

Q Uh huh? A I went back for another

physical; I'm not sure about the date, though.

Q At that time did you tell the doctor that you had petit mal, epilepsy, for five years? A Yes, I did.

Q What was the result of your second physical? A Well, the doctor told me that I could be dismissed, and that he'd call me back in a couple of months so I could show a proper documentation certifying to the fact that I did have epilepsy.

Q Did you go back? A No.

MR. HARRIS: Request that this be marked Grand Jury Exhibit #3, and this, #4, of this date. (so marked)

Q I show you Grand Jury Exhibit #4 of this date, and ask you if you recognize it? A Yes, I do.

Q What is it? A This is my New York State driver's license.

Q Would you please look at it, under the section, "Questions", and read question #1 out loud? A "Have you ever been treated for epilipsy, convulsive disorders, fainting spells or any condition which caused unconsciousness?"

Q What answer did you give to that question? A "No."

Q Look at Grand Jury Exhibit #3, and tell us what it is, if you know? A It's a New York drivers license application.

Q Would you similarly read the question relating

to epilepsy, on that application? A "Have you ever suffered from epilepsy, paralysis, fainting or dizzy spells or addicted to hard drugs or liquor?"

Q That is your application, is it not?

A Yes.

Q What answer did you give? A "No."

Q Do you presently hold an Illinois driver's license? A Yes.

Q Have you ever signed a license application like that, or a similar one? A I don't remember.

MR. HARRIS: Request that this be marked Grand Jury Exhibit #5 of this date. (so marked)

Q Take a look at that: do you recognize that?

A No, to tell you the truth, I don't; I don't remember it.

Q Does it bear your signature? A Yes.

Q It's a printed form to "Clerk; Local Board #-"; there's a blank, and it's filled in "#6", Valley Stream, New York, and a zip code: "This is an appeal to your moral and social conscience. Do you realize the criminal part you play in the operation of the was in Viet Nam, and the ---- of the nations youth", - (reads exhibit) Did you send that to the Draft Board? A No, I don't think I did.

Q Well, would you look at the envelope, addressed to the Selective Service Board: is that your handwriting on the envelope? A No.

Q Do you know who sent it? A No.

Q Do you know how your signature got on the letter? A I signed the letter.

Q Did you sign it under duress? A No, I didn't sign it under duress, I signed it under pure pressure.

Q Did you ever file a claim with the draft board as a conscientious objector? A No.

Q Now, let's get back to Dr. Nathan Lemler. Did you ever meet him? A No, sir.

Q Did you ever speak to anyone in his office on the telephone? A I spoke to him once.

Q In relationship to what? A In relationship to my grades in school; he wanted to know how I was doing in school.

Q Did you ever call him up and tell him that you received your #1-A classification? A No.

Q Did you ever call him up and tell him that you had an induction notice, and were instructed by him to send him the induction notice? A No, not that I can recall.

Q Did you ever call him up and tell him that you had passed your physical, and that you had been home on Saturday and call him on Monday, May 5, 1971? A No.

Q Did you ever call him on May 11th and tell him that you were acceptable for active duty? A No.

Q Do you know Seymour Terry? A No.

Q Did you ever have an interview with

Nathan Lemler? A No, sir.

Q Now, you said that you went to Lemler, or, your parents did, initially, for law school? A Yes, correct.

Q When did you take the law boards? A I took the law boards in '71, the first law boards.

Q Did you ever apply to Fordham Law School? A No, there were never any formal applications.

Q You never applied to any law school? A Yes.

Q What law schools? A University of New York, University of Louisville, University of Miami, and that was about it.

Q Were you ever accepted at any? A No, sir.

Q What did Dr. Nathan Lemler do for you in behalf of your attempt to go to law school? A I don't know.

Q Did your parents ever tell you what he was going to do for you? A No, they spoke in generalities. They told me he was trying to get me into law school.

Q Where did you do your undergraduate work? A At the University of Louisville.

Q What kind of average did you end up with? A I think about a #2-6; #2.6.

Q In November of '71, when you told the doctor at the induction station that you had epilepsy, you said that

you'd had epilepsy for five years? A Yes.

Q That would put it back to about 1966 or '67? A Actively, yes.

Q In 1966, what doctor did you see? A I didn't see -- I first found out I had epilepsy back in 1959. Then I had it for a couple of years, and it faded away, and came back in 1966.

Q What doctor did you see in '66? A I didn't see a doctor in '66; I saw a doctor in '59.

Q Did you see a doctor in 1967? A No.

Q Did you see any doctor in 1968? A No.

Q '69? A No, I was not seeing a doctor.

Q 1970? A No.

Q 1971? A No.

Q 1972? A No, I haven't seen a doctor in 1972.

Q So the last time you saw a doctor for epilepsy was in 1959? A Yes; '59, '60.

Q What was the name of the doctor you saw in 1959? A It was a Dr. Nathan.

Q Do you know where he practiced medicine? A He practiced in Brooklyn.

Q Do you recall his first name? A I think it was Arthur; I don't remember.

Q Are you quite sure that you didn't see a doctor in 1971 for your epilepsy? Is there no question in your mind about that? A No, I never did, not as far as

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treatments are concerned.

Q Did you see a doctor in '71 for any reason?

A No; no.

Q MR. HARRIS: I request that this be marked Grand Jury Exhibit #6 of this date. (so marked)

(cont'd. by SA)

Q At the time you went and told the doctor that you had Petit Mal, epilepsy, for five years, did you tell him that you were under treatment with any drugs at that time? A Yes, I was taking drugs.

Q Now, were these prescription drugs? A They were, yes.

Q And you hadn't seen the doctor since 1959 for this ailment, is that right? A As far as treatments, yes.

Q You said you hadn't seen the doctor in 1971 at all, is that right? A Yes.

Q What about 1970? A Not in 1970.

Q You said you spoke to Dr. Nathan Lemler on one occasion. At the time do you remember what you spoke to him about? A Yes. He wanted to know how I was doing in school and I told him.

MR. HARRIS: Mr. Foreman, would you excuse this witness, temporarily.

THE FOREMAN: Would you wait outside in the witness room.

(THE WITNESS LEAVES ROOM AND IS RECALLED.)

THE WITNESS: I am still under oath.

THE FOREMAN: Yes.

MR. HARRIS, MR. Falcoff, you are still under oath.

THE WITNESS: Yes.

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Q I ask you to look at Grand Jury Exhibit 5 again. You said you signed this under peer group pressure. Will you tell us the circumstances how your signature appears on the bottom of that? A To tell you the truth, I don't remember the circumstances under which I signed. A lot of people were signing it and I signed it. That is how it was.

Q If you don't remember how you signed, will you explain the circumstances which led you to the conclusion that you signed it under pressure? A The pressure was everybody was signing, so I felt I should sign it, too.

Q Well, did anyone -- well, you felt you should sign. In other words, did you believe in what you were signing? A To tell you the truth, I didn't even read it before I signed it.

Q Is that a frequent practice of yours? A Not reading before I sign, no.

Q What did you think it was? A Well, I thought it was a protest against the war in Vietnam, that is what I thought it was.

Q How did you know that if you didn't read it? A I just didn't read it all. I glanced through it, I didn't read word for word. I just picked out words, like, Help the cause, and I signed it.

Q When did you sign it, do you know? A I don't know. I was in school, definitely; I guess it was in between 1968 and 1971.

Q Well, then, there is no specific pressure that you can describe to us that forced you to sign that, is there? You can't recall when you signed it. A Well, nobody took a gun to my head and told me to sign, if that is what you mean.

Q What pressure did you have in mind when you answered you signed it under peer group pressure, if you can't even recall when you signed it? A Well, it was the type of thing where everybody was signing it and said, "Come on, let's sign. It's against the war in Vietnam," and I signed it. That is how it was, it was like a mob type reaction signing this thing.

Q Where was this mob? A It was in school, at the Univerty of Louisville, where I signed it.

Q Do you recall the specific occasion on which you put your signature on that? A No, I don't, I really don't recall the specific instance.

Q Now, what is the present status of your Petit Mal epilepsy? A It's stable; the condition is stable.

Q You still have it? A No, I haven't had a seizure in two years.

Q Do you have any guarantees that you won't have any other seizure? A No, there is never a guarantee.

Q At the time you took your second physical, you told the doctor that you were receiving medication. What was the name of that medication. A Dilantin and phenobarbital.

Q And who prescribed that for you?' A My doctors.

Q What doctors? A Well, there was a Dr. Karp, K-a-r-p, and in Long Beach, prescribed it for me a long time ago.

Q A little while ago you said you hadn't seen a doctor since 1955. A This was a long time ago.

Q When did you see Dr. Karp last? You told us about Dr. Nathan. A She was our family doctor in Long Beach. The last time I had seen her was before I went to school in 1967 for a final checkup before I went to school.

Q And what happened at that checkup? A It was just a regular checkup. She had checked me out and at that time I was all right.

Q And this dilantin prescription ran without your seeing her from 1967 through 1971? A Right.

Q And did she ever treat you for epilepsy? A She never did. There was a doctor - I don't remember his name. My seizures were really bad from about 1959 to about 1963 and I was having them very frequently and that was when I was under active treatment, but I don't remember the doctors. Oh, I have a note here. (Witness looks at note) Dr. Pulito, P-u-l-i-t-o, that is his name.

Q You neglected to mention it when I asked you about treatment for epilepsy before. A That was before you asked if I was treated between '55 and '71.

Q I asked between '59 and the present. A I

was treated for epilepsy, yes.

Q Who else treated you. Before you said Dr. Nathan. Now I hear about two other doctors. I want to hear about all the doctors. A Right.

Q Who else is there? A That is it.

Q Between '59 and the present you have seen no other doctors than the three you have mentioned, is that right? A Correct.

Q Back in 1959 did you ever have any EKG's? A Yes.

Q And who gave you those? A This Dr. Pulito gave it to me.

Q Now, when you were at the University of Louisville, did you ever have occasion -- By the way, what was that note you just referred to? A This is the result of those EKG's that you just mentioned.

Q Can I see that, please? A Sure.

MR. HARRIS: I request this be marked Grand Jury Exhibit 7. (So marked.)

Q When is the last time you saw Dr. Pulito? A It was in '61, I think.

Q You say Dr. Nathan in '59, Pulito in '61 and then Karp in '67? A Yes, right, but with Karp it was off and on because she was my family doctor.

Q But last time you saw Karp was '67? A Right.

Q Did you ever get your prescription refilled while you were at the University of Luisville? A No. Renew?

I thought you mentioned renewed. Yes, I had it refilled.

Q What do you do when you get a refill? A I had a running prescription, so I went to the drug store and got a refill.

Q What drug store did you use in Louisville? A I don't remember.

Q When you were at the University of Louisville did you ever take a physical for either health insurance or general college requirements? A No.

Q They required no medical check whatsoever? A No, not in school.

Q Did they ask you for a medical examination before you went there? A Yes.

Q What did you tell them about your epilepsy? A I told them that I didn't have it.

Q Now, when is the last time that you remember a seizure? A It was two years ago.

Q And when was the one before that? A About three and a half years ago.

Q Now, the last time you had one, two years ago, what doctor did you see when you had a seizure, what doctor did you see? A I didn't have a doctor.

Q You had a seizure and didn't see a doctor? A No.

Q What about three and a half years ago? A I didn't see a doctor.

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Q When was the last one before three and a half years ago? A 1965.

Q That is nine years ago. Who did you see when you had that seizure? A I didn't see anybody. Nobody knows about that but myself. I was alone. I didn't tell anybody I had it.

Q How did it happen that Dr. Karp gave you medication for epilepsy? Did you tell Dr. Karp that you had epilepsy seizures? A Yes.

Q Of course the only seizures that you have talked about have followed the 1965 seizure, is that right? A That is right.

Q You haven't seen Karp since 1967? A Right.

Q Now, you said you had epilepsy since '59, yet can you explain why it is that you told the doctor at the Armed Forces Examining Center in 1971 that you had epilepsy for five years, when, according to your testimony now, you had it for twelve years? A No. He just said, "How long have you had this condition?" And I just told him, "Well, for around five years."

Q It was in fact twelve years? A Yes, sir.

Q Did you forget that you had it since '59? A No, I didn't, but I was actually under active medication for the last five years. That was the question he put to me.

Q Active medication for five years? How do you figure that? A There was a period from 1962 to 1967 that I wasn't taking any medication at all for the condition.

Q So you have a seizure in '65, two years later you go see Dr. Karp and Dr. Karp puts you on medication, is that correct? A Yes, she gave me a prescription just in case. She didn't put me on medication, she just said, "Here is a running prescription just in case."

Q That is different. When did you get that - first get that prescription filled? A In 19-- Wait a second. In 1970.

Q You carried the prescription around for three years without getting it filled? A (Nods.)

Q Where did you get it filled? A In Louisville.

Q What caused you to get it filled? A I was very physically active at that time and I did have a seizure while I was in school and I just wanted to get it filled just to have it on hand just in case.

Q Which of these seizures that you indicated is this one? A The one that was three and a half years ago. It was around the middle of 1970.

Q So for the first time you got Dr. Karp's prescription filled in 1970, a prescription that was issued three years before? A Uh-huh.

Q Where did you keep it? In your wallet, folded up? A (Nods.)

Q Is that yes? A Yes. Yes. I am sorry.

Q Three years go by and you need it and you get it filled? A Uh-huh.

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Q By the way, do you have any of your medication with you today? A No, I don't carry it any more.

Q Why is that? A I don't feel that I need it any more.

Q Have you seen a doctor who told you that?
A No, this is just my own judgement. I don't carry it with me.

Q Did you have it that day in 1971 when you went down for your physical? A No, I did not have anything. I didn't have any documentation or anything like that.

Q Did you have the pills? A No.

Q When is the last time that you have taken one of these pills or are they in pill form, by the way?
A Yes, they are, they are in capsule form.

Q When was the last time you took these pills?
A Three years ago.

Q 1971? A Yes.

Q And what caused you to take one of the pills?
A Well, I just felt something coming on. I took one of the pills to prevent it from coming on, one of the seizures.

Q Now, you are sure you have absolutely no recollection of where you got this prescription filled in Louisville?
A I don't. I don't remember the name of the drug store.

Q What is the dosage of these pills that you take?
A How mean, how many pills do I take at a time? I take one dilantin, but phenobarbital you are supposed to take all

the time.

Q Let's stick to the dilantin. You got prescription filled in 1970. How many pills were in the prescription? A They were - let's see - twenty-five on the prescription.

Q You took one in '70 when you had the seizure which you described as three and a half years ago; you took one when you felt something coming on. Any other time you have taken it? A No, I haven't taken any since then.

Q Where are the remaining pills? A I threw them away.

Q You threw them away. Why? A Because I felt I didn't need them any more.

Q Yet you could have a seizure any time? A I could have a seizure right now.

Q Why didn't you keep the pills? A Because I didn't have any rule. I just didn't want it. It seemed like a stimulus to bring on something. It reminded me of my condition.

Q When you went to get this prescription filled, did the druggist give you a hard time at all? A No.

Q Didn't mention that it was three years old prescription from another city; it was against the State law in the State of Kentucky to fill such a prescription? A No.

Q You are sure you got it filled in Louisville?

A Yes.

Q By the way, do you use any alcoholic beverages?

A No.

Q Never? A Well, no.

Q You don't have a bottle of beer occasionally?

A No.

Q Now, you are now twenty-five years old, is that right? A I am twenty-four.

Q You are going to be twenty-five? A Yes.

Q When is the first time you had your driver's license?

A In 1967 I think it was issued.

Q Did you have a driver's license in one of the states of the United States from '67 up to and including the present?

A Yes, sir.

Q During that period of time you have had an epileptic seizure, you felt another one coming on in 1971 and you have been driving a car all that time, is that right? A Yes, sir.

Q Were you behind the wheel, by the way, when you had this fit? A No.

Q What is the full name of Dr. Karp and where does Dr. Karp practice medicine? A Her name is Dr. Frances Karp and she practices in Long Beach, New York.

Q And Dr. Nathan, did we get his first name?

A Arthur.

Q Arthur Nathan. And he practices in Brooklyn?

A He did. He is dead now. He has been dead for the last five years, I think.

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Q What about Dr. Pulito? A Pulito, I lost track of him. I don't know where his practice is.

MR. HARRIS: I request that this be marked Grand Jury Exhibit 8. (So marked.)

Q Now, Grand Jury Exhibit 8, Mr. Falcoff is a business record, portions of a business record from the business of Dr. Nathan Lemler, and what it is is an extract from his telephone message book of all calls relating to you. I would like you to look at this and tell me which extract refers to your law school problem.

(Cont'd by RSK)

Rel SA

MR. HARRIS. Witness: RICHARD FALCOFF.

Q Well, do you have an explanation as to -- well, would you say that these seem to refer to your Selective Service problem, these calls? A Yes.

Q And you've testified that you did not go to Dr. Nathan Lemler for that reason, - you and your family had no contact with him with regard to Selective Service?
A Right; it was strictly directly with law school.

Q Are there any telephone calls, - admissions, rejections, applications, - on here? A Not that I know of.

Q In fact, every one of those calls except the ones that say "call back and leave a phone number", refer to Selective Service? Right? A Yes.

Q What is your explanation for that?
A That was directly in relation to my getting into law school; that's why I was reclassified #1-A. I wanted to get back my #2-1 classification so I could continue to law school.

Q What did that have to do with Dr. Lemler? Why, for example, on the 21st of December, did your parents or Mr. Falcoff call, - either you or your father, - in reference to the classification - "did not receive any notification so far", - why did you tell that to him? A I didn't tell that to him. I don't know anything about that.

Q What about the call from Richard Falcoff, March 3, 1971, that he must chedk with the draft board personally: the request must bear his signature?
A I did not make that phone call either. The only

phone call I made to him was giving him my grades in reference to getting into law school.

Q What about all these phone calls regarding Selective Service; what's this all about? A I did not make those calls.

Q You have no knowledge of them? A I have no knowledge of those phone calls at all, as far as this is concerned.

Q You're aware that you're under oath here? A Yes, sir.

Q Richard Falcoff, July 14, 1971: "received #1-A classification", - did you ever make that phone call? A Yes, I told them that I was re-classified #1-A, and that I'd like to get my #2-S, so I get back into law school. He could give me back and renew his efforts to get me back into law school.

Q Finally, you got your #1-H, in April of '72, is that correct? A Yes, sir.

Q When were you going to go to law school? A As soon as I could.

Q When did you graduate? A I graduated in August of '71.

Q By that time you had received all your rejections, had you not? A No.

Q When did you get your last rejection? A In '73.

Q Let's take it one step at a time. When was

the first time - and to what school - did you apply to law school? A The first school I applied to was the University of Louisville.

Q For what class did you apply? A I applied for the class of - the entering class - of September, 1972.

Q When did you file that application? A I don't recall; I imagine in the beginning of 1972, I guess, around February.

Q That was the first time you ever applied to any law school? A That was, yes.

Q In case you hadn't notices, the last call of all the calls between your family and Lemler is December of '71? A Right.

Q You hadn't even applied to law school? A Right; it was in preparation for my application.

Q What preparation? A The man had contracted to get me into law school, and he was just feeling out his contacts, to see if my chances to get in, - I had not made any formal application at that time.

Q What happened at the University of Louisville, with your application for law school? A I was rejected.

Q What other applications for law schools did you fill out, and when? A Well, I moved to North Carolina, and I applied to the University of North Carolina at Chapel Hill, in 1972, and I was subsequently rejected from that law school also.

RSK-4
6/24/74(2)

Falcoff

Q You applied for the class of '72 in September of '72? A Yes.

Q The same class? A As the one in Louisville.

Q What other law schools? A I applied to the University of Miami at that time also.

Q To the class of '72? A Yes.

Q Any other law schools? A No, not that I can recall.

Q When you graduated from the University of Louisville, - that was when, did you say? A August of '71.

Q August of '71, you knew that you were not going to school that September, is that right? A Right.

Q And you've testified here that these calls in 1971 were to get back your #2-S classification? A So I could get into law school.

Q Well, a #2-S classification means you were in school; attending school? A Right.

Q You were not in school? A I was in school up to August.

Q But in between August and September of '72, when you hoped to go to law school, you were not in any school, were you? A No.

Q You had no basis for a #2-S classification at that time, did you? A No; I was trying to get into

school at that time.

Q Well, what was that all about? A #2-S classification that you were hoping to get back?

A That was in preparation for getting me into law school.

Q But you very well know that that #2-S means that you're in school, and you don't get a #2-S on your hopes of getting into school? You went to college; you know that. A Yes.

Q As a matter of fact, the school has to actually send proof to your draft board? A Right.

Q As a matter of fact, you were classified when you were in college;-they said you were entitled to that classification, - right? A Yes.

Q This is about the classification that you were hoping to get -- when you were in Louisville -- you were not in Louisville, as a matter of fact? A At the time, I was trying to get into law school.

Q That's not the question. You knew, when you were not entitled to a #2-S, once you had graduated from the University of Louisville, isn't that right? A Right, as far as August goes, yes. In August of '71, I knew I was not entitled to a #2-S.

Q Since you've graduated from the University of Louisville, have you been a full-time student in any college?

A No.

Q Oh, since you have graduated from the University of Louisville, you've never been entitled to a #2-S classification? A Right.

Q As a matter of fact, what did you do when you graduated, in 1971? A I moved to Raleigh, North Carolina, got a job at the public library there, and I applied to law school in Chapel Hill.

Q Now, what were all these calls about the #2-S to Lemler? A I don't know, because I did not make -- I only made one call to Dr. Lemler, and gave him my grades. That was the only call I know about.

Q So you have no idea what these calls were about, or who made them in your behalf? A I don't know who made them in my behalf. I imagine my parents made them in my behalf.

Q Now isn't it a fact that you, Mr. Falcoff, went to Dr. Lemler, and that Dr. Lemler, - or, your parents did, - and paid him a fee to get you out of the draft? A As far as I know, no.

Q There's a gentleman that you rode up in the elevator with today: is that your father? A Yes, sir.

Q Where is he right now? A I imagine he's somewhere in the building, waiting for me. He's probably in the lobby downstairs.

Q Why didn't he come up here with you? A Why not?

Q Yes. A Because he wanted me to go it alone.

Q I just want to go over this one more time, because I'm a little confused, and I want to be sure that I understand what you're saying.

(cont'd. by SA)

SA-1 (II) June 24, 1974
June Reg. Re: John Doe
Rel. RSK Mr. Jeffrey Harris Witn: Richard Falcoff

Q That March 3, 1971, there is a phone message from Richard Falcoff, "Must make request draft board" - one unreadable word - "and request must bear his signature." You never made that phone call, is that right? A Regarding what, sir?

Q I am reading the message, "Must make request to draft board." A In March of -- ?

Q '71. A That is right. That was to try and get my 2-S status back.

Q You were graduating in August? A In August, that is right, but I was reclassified, I think, in March of that year, 1-A.

Q Well, to refresh your recollection, I will tell you that in January 11, two months before that, you were classified 2-S, that you were not classified 1-A until July 12, 1971. A (Nods.)

Q Now, why would you have any contact with the draft board in March? A That was just my recollection. If it was July, then it was July.

Q Why in March would you call Dr. Lemler, who is trying to get you into law school according to your testimony, about the draft board in March? A I don't know.

Q As a matter of fact, there is a note on July 14, 1971, "Richard Falcoff SS received 1-A classification." What was that about? A I didn't make that call.

Q A minute ago you testified that you did have that

SA-2

6/24/74 Falcoff

call, that you called to advise you were reclassified 1-A on July '71. Okay. I told him I was classified 1-A, what my chances were of getting into law school.

Q That was July, you hadn't applied to law school?
A I - I just wanted to find out what my chances were the following September, if I could get into law school considering my status was 1-A.

Q What did you do to get into a law school for that September '71 class? A Unfortunately in August it was to late to apply. I didn't apply in '71.

Q When did you take the law board for the first time?
A I took it in '71. I realized I was too late to get in in '71.

Q So in July you called and you told him you got your 1-A classification and this was all in reference to the possibility of going to law school in September '71?
A That is right.

Q And you hadn't even taken the law board yet?
A That is right. I just wanted to find my chances.

Q There is no law school you can get into in the United States of America without going into the law board. Didn't you know there wasn't a school in the United States of America that you can go to without your law board?
A That is right.

Q You didn't have to call Dr. Lemler to find out whether you could get into law school in '71, is that right?

SA-3
6/24/74 Falcoff

A Yes, I wanted to find my chances if I took my law board in 71 if I got under the wire to apply for law school in 1971.

Q You also knew that the law board is only offered at certain times during the year, didn't you? A Yes.

Q You have gone to four years of college. You applied for college previously, before you went in. You knew previously, without law board application on July 14th you wouldn't be going to law school in September. A I thought there was an outside chance he could get me into law school in September.

Q In October classes are already started; you knew you weren't in, that you still had not applied. A No.

Q "Richard Falcoff told him to send us the induction notice." What was that all about? A I don't know.

Q Did you send him your induction notice? A I sent him my induction notice? Did I? I don't think so. I don't think I sent him anything as far as classification service is concerned.

Q "Call from Mr. Falcoff in December re your classification of 4-F. Had not received any notification of this so far." What did your classification of 4-F have to do with Dr. Nathan Lemler? A Only as far as my availability for getting into law school is concerned, as far as I know. As far as I know, he never had anything to do with the selective service in my behalf.

Q Where are you going to meet your father?

A Downstairs; I guess downstairs.

Q What do you mean, you guess? A I imagine he is down there waiting for me, that is what I mean.

Q In the lobby? A Yes.

Q Well, would you please go to the witness room.

MR. HARRIS: Mr. Foreman, would you excuse the witness, askhim to wait in the witness room.

THE FOREMAN: You may be excused temporarily.

(THE WITNESS LEAVES ROOM.)

Richard Falcoff

[WITNESS RECALLED]

WITNESS: I realize I'm still under oath.

BY MR. HARRIS:

Q You're still under oath as you know and the same rights and warnings that I gave you this morning apply. Do you remember what they were? A Yes.

Q In 1971 did you have an automobile accident on the way back to college? A Yes, I did.

Q Who was driving? A I was.

Q As a result of a epileptic fit? A No, as the result of carelessness.

Q Are you presently insured by an insurance company to drive an automobile? A Yes, I am.

Q What company? A All State.

Q Do they know about your epileptic condition? A No.

Q What was your major in college? A English.

Q Now when you went for your physical or your induction physical and you told the doctor you had epilepsy, tell us as best you recall what you told him? A Okay. He came and asked me is there anything to impede my service in the army -- in doing my duty, he said, speak now, this is the last chance you're going to get, and warnings about disability. All right, I have something to tell you. We went into his office and I told him I had a history of epilepsy. He sayd why didn't you bring it up before. I told him I thought it

Falcoff

would prevent me from getting a job and many other benefits epileptics weren't getting.

Q Did you state you were under the treatment of Dr. Lemler? A Yes, I did.

Q Isn't it a fact you had taken one of the twenty-five pills you had? A That's true.

Q Did you tell him that you had only taken Dr. Lemler's pills once? A No, that's not what I told him. The question he put to me was, have you been under medication? I said, yes, I had.

Q That wasn't true? A I had been under mediciation for that condition.

Q In fact you had only taken a pill once, is that correct? A Well, that one time and then from -- let me see, yes.

Q This morning, early this morning, you said you had, if I understood you, gotten the prescription renewed: You had no trouble renewing it. A Yes, I did.

Q How does that square, this prescription had twenty-five pills, and you told us you took one pill and three the rest away? A I told you I didn't need the pills.

Q When did you renew the prescription? A I renewed it in 1970.

Q And you say you got them in '67 and carried them around until '70 at which time you took two pills and threw the remaining twenty-three away? A That's right.

GH-3

6/24/74

Falcoff

Q What was the occasion to renew? A I had undergone an epileptic fit and I had felt it come on and I had it renewed.

Q What was the reason for renewing it? A Wait a minute.

Q Mr. Falcoff, renewed, you're a college graduate, do you know what the word renewed or refilled means? A Yes.

Q You testified you didn't get it filled until 1970 and you took two pills and threw the other twenty-three away. Now when did you have the prescription refilled, that means fills again, not the first time? A Not in 1970 -- after 1970.

Q I think 'refilled' you know what the word means? A Yes.

Q I'm trying to get the -- A The exact date you're trying to get?

Q You tell me? A I had it, I used the two pills and I threw away the rest and I got it refilled in 1970.

Q If you had it refilled in 1970, when did you have it filled for the first time? A I never had occasion to have it filled. I had it filled in 1970.

Q Refilled is the wrong word? A No, I had it filled for the first time in 1970.

Q You're an English, why is my question confusing you, what seems to be the problem here? A Nothing, I have nothing to hide from you.

Q Now when you were sent home after your induction

physical and told you would be called back in a month or so, Falcoff were you called back? A No, I wasn't.

Q Did you call the Draft Board and tell them? A No, I did not contact them.

Q Why not? A When I left he said the Draft Board would contact you when they wanted the documentation; they didn't say anything about my contacting the Draft Board.

Q Was it one or more services that Nathan Lemler performed, did he perform any services for you in connection with your Selective Service status? A Not that I know of.

Q Would you know if it if he did? A No, as far as I -- all that Nathan did was try to get me into law school.

MR. HARRIS: Would you excuse the witness, please.

FOREMAN: You may be excused.

[WITNESS LEAVES ROOM]

GH-1
Re: John Doe
June Reg.
Foll. GH Mr. Harris

Richard Falcoff

[WITNESS RECALLED]

MR. HARRIS: Mr. Falcoff, you are still under oath and the same warnings apply?

WITNESS: [Nods].

Q Two questions: Why did you inform the doctor the second time around that you had epilepsy? A The reason that I did that I felt it would impede my service to the United States; I felt I would be in danger if I lied, I did have epilepsy, I would be lying.

Q Do you feel you're in danger behind the wheel of a car? A No.

Q Isn't it a fact you told them this because you would go to Fort Dix if you didn't come up with something that day which -- A That isn't, I didn't come up with any --

Q This prescription, did you alter it in any way before you had it filled? A No.

Q Are you married? A Yes, sir.

Q Do you have any children? A No, sir.

Q Are you expecting any? A No, sir.

Q Do you have life insurance? A No, sir.

Q Have you ever applied for any life insurance? A No.

MR. HARRIS: I have no further questions. Would you excuse the witness.

FOREMAN: You're excused.

MR. HARRIS: You and your father are free

Falcoff

to go.

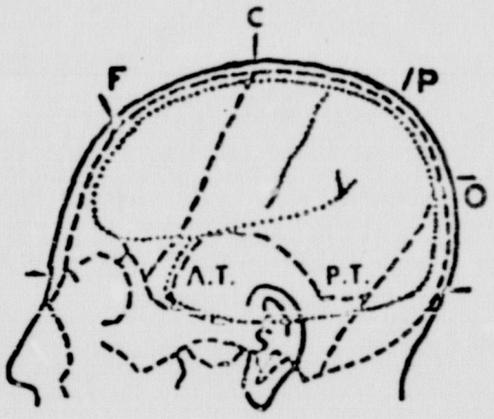
WITNESS: Thank you.

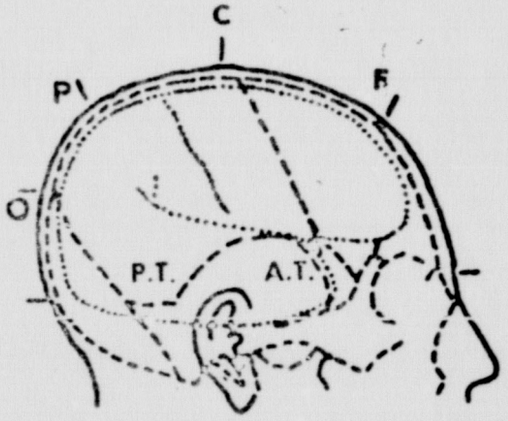
[WITNESS LEAVES ROOM]

EXHIBIT C - ELECTROENCEPHALOGRAPHY OF RICHARD FALCOFF 541a

NAME: Falcoff, Richard DATE: 5/11/59

E.E.G # 1563 CASE NOX of Dr. Alfred Nathans AGE: 9




| | |
|---|---|
| Condition and Cooperation | Patient was cooperative. |
| General Pattern | Anteriorly, an irregular low amplitude 12-16/sec. beta activity is noted. Posteriorly, a highly irregular but fairly well defined 9/sec. alpha activity of essentially medium amplitude appears. The tracing contains a fair percent time of slow, irregular 5-6/sec. wave forms of medium amplitude which are noted diffusely throughout. From the right anterior temporal lead and to a lesser degree the right central leads, negative spike and diphasic spike discharges are seen. |
| Bilateral Relationship | The two sides are dissimilar because of the spike discharges noted from the right anterior temporal and to a lesser degree frontal leads. |
| Hyperventilation | This produced progressive slowing and increase in amplitude leading to numerous runs of moderate to high amplitude 4-6/sec. wave forms, at times noted with a hypersynchrony in all leads. The after effect lasted approximately 30 seconds. |
| Impression | This is an abnormal record, demonstrating a spike/focus discharge in the right fronto-anterior temporal region. This most likely represents an epileptogenic focus. |

FP/ms

Frank Pulito, M.D.

ELECTROENCEPHALOGRAPHY OF RICHARD FALCOFF

(Omitted here but printed at page 541a)

COURTS DECISION DENYING DEFENDANT'S MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA, :

74 Cr. 928-CLB

:

-v-

: MEMORANDUM AND ORDER

WILLIAM SANGEMINO, :

Defendant. :

- - - - - - - - - - - - - - - - - - - - -X

Brieant, J.

On April 18, 1975, the jury returned guilty verdicts on each of three counts against the defendant William Sangemino, a Major in the United States Army Reserve. The three counts charged the defendant with conspiracy to defraud the United States, in violation of 18 U.S.C. §371; with having accepted a bribe as a public official of the United States, in violation of 18 U.S.C. §201(c); and with having made a material false statement before the grand jury, in violation of 18 U.S.C. §1623. At the times relevant here, defendant was on active duty status, assigned to the New York City Headquarters of the Selective Service System, in the capacity of "assistant chief of the field division" and later as Manpower and Training Division Chief. (Trial transcript ["Tr."] pp. 813-14). His duties, as described by him and his superior,

included responding to inquiries from Selective Service registrants, the general public and public officials, lecturing to organizations and school g.oups, and handling relations with dignitaries concerned with Selective Service operations in New York City.

On June 30, 1975, defendant, represented by new counsel, moved for an order, pursuant to Rule 33, F.R.Crim.P., granting him a new trial. Defendant, by his new counsel, contends that a new trial should be granted "in the interest of Justice" because the defendant was deprived of the effective assistance of counsel in that his trial counsel failed to represent him competently. Defendant also contends that he is entitled to a new trial because the Assistant United States Attorney failed to disclose exculpatory material, in violation of the rule of Brady v. Maryland, 387 U.S. 83 (1963).

I

We turn first to defendant's claim of ineffective assistance of counsel. A determination of the effectiveness of defense counsel's representation cannot be made in the abstract. The measure of counsel's effectiveness must be evaluated in the context of the case as it unfolded before the jury. United States v. Katz, 425 F.2d

928 (2d Cir. 1970). There are many criminal cases in which even the most persuasive advocate or the most adept practitioner cannot prevail. Against the strength of the prosecutor's case, even the most able defense counsel may be unable to dispel the image of the smoking gun, or silence the ringing testimonial accusation of a victim, which becomes set in the minds of the jurors. The appropriate way to begin our inquiry, therefore, is by examining the strength of the prosecution's case. United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973).

A significant portion of the Government's case was introduced through the testimony of an unindicted co-conspirator, Nathan Lemler. Lemler testified that he had been retained by young men or their parents in 401 cases to provide assistance in obtaining Selective Service deferments, or compassionate discharges or reassignments from the armed forces. As to 400 of these, he says he succeeded.

Lemler first met Major Sangemino in 1968 in Sangemino's office when, in connection with a college and graduate school placement service Lemler operated, he made an innocuous inquiry of defendant at Selective Service headquarters in Manhattan.

Sangemino answered the inquiry in a manner considered helpful by Lemler. Lemler testified that he then said to Sangemino that he would lik to make a contribution to Sangemino's favorite charity, and placed three $100.00 bills in a two-tiered mail basket on Sangemino's desk. It was Lemler's testimony that Sangemino escorted him to the elevator, with his arm around Lemler's shoulder, and said that if Lemler ever had a Selective Service or military problem, he was certain that he could handle it. The Government presented its case against Major Sangemino by focusing on five of Lemler's cases.

Lemler testified in detail about the charades he orchestrated to obtain a compassionate reassignment to stateside duty for Major Gerald Weiss, and a compassionate discharge from the Army for David Zweibel. In both instances, Lemler testified that, with the advice of Major Sangemino, a close member of the soldier's family staged a fraudulent suicide attempt and was, thereafter, temporarily confined at South Oaks Mental Hospital on Long Island, New York under the care of Dr. Teitelbaum, a psychiatrist named as a co-conspirator. Both scenarios achieved their desired results of relieving the soldiers of the possibility of assignment to duty in Vietnam. Lemler testified that he paid Sangemino $1,000.00

or $1,200.00 for his helpful advisory role in the Weiss case, and $800.00 for his part in the Zweibel case.

Lemler testified that a similar scenario had been staged for the benefit of Lieutenant Joseph Petro. It was arranged with Dr. Teitelbaum to invent a history of emotional disorders for the Lieutenant's mother; thereafter, she was admitted to South Oaks as a patient of that psychiatrist. Lemler failed in this attempt to obtain a discharge or reassignment for Petro. Lemler testified that he paid Sangemino $1,000.00 in connection with this attempt. Lemler testified that, when he was requested by Petro's parents to make a second attempt, he consulted with Sangemino who arranged for a conference between Lemler and Lieutenant Petro, and a Colonel Nicholson at the Pentagon. Sangemino provided Lemler with his business card with a note of introduction written on the back. Lemler testified that Sangemino requested an additional payment because the handling of this case "was an expensive situation upstairs." (Tr. p.365). Colonel Nicholson revealed that a compassionate reassignment would not be forthcoming because Lieutenant Petro, a patriot, unbeknownst to Lemler, Sangemino or Petro's parents, had <u>requested</u> overseas assignment. Lemler testified that the Petro case was his lone failure, out of the 401 draft and

military cases for which he had been retained.

Lemler also testified that he had been retained by Mrs. Leonora Resnick to place her son Edward in medical school and/or to obtain a draft deferment for him.[1/] Lemler testified that he had placed Edward Resnick in medical school in Barcelona, Spain but that Resnick remained there only one week. Resnick was called for a pre-induction physical examination for which he failed to appear. When Resnick was called a second time, Lemler telephoned Sangemino who told Lemler to come to his office. At a meeting in Sangemino's office, Sangemino gave Lemler his personal business card, with a note written on its reverse side and initialed by defendant, for Resnick to present at the Armed Forces Entrance Examination ["AFEE"] Station to which he was to report for his physical. The note (Government's Exhibit 4) reads:

"Rm 127

Mr. D'Ambrosi -

Please call me about Resnick

WFS"

Edward Resnick failed his pre-induction physical. According to Lemler's testimony, he paid Sangemino $1,500.00 in connection with Edward Resnick's case.

Lemler testified about his involvement in the case of Richard Falcoff. After consulting with Sangemino, Lemler had Falcoff visit a Dr. Wesolowski to arrange for there to be found some physical defect that would entitle Falcoff to a medical deferment. Lemler testified that, at first, they had discussed seeking a medical deferment because of a polynodal cyst, but later it was decided that the grounds would be epilepsy. Falcoff had previously been examined at an AFEE Station in Louisville, Kentucky and had been disqualified with the recommendation that he be recalled in one month. Falcoff was not recalled because it was subsequently determined that his draft lottery number would not be reached during that calendar year. Although Lemler did not testify further regarding the services he or Sangemino provided in the Falcoff case, Lemler stated that he made two payments to Sangemino in connection with this case totalling $1,500.00.

The Government introduced a tape of a conversation between Lemler and Sangemino recorded on March 20, 1974. The recorded discussion concerns possible explanations to the grand jury of notations in Lemler's records indicating payments to Lemler, and by Lemler to Sangemino. A portion of the transcript of this conversation is set forth below, but the cold words of this transcript

cannot convey the desperate quality of this conversation. It must be heard to be understood.[2/]

A fundamental consideration in the presentation of this case was what credibility could be attached to the testimony of Nathan Lemler. Both the Assistant United States Attorney and defense counsel inquired about Lemler's prior convictions, his not infrequent false representations, and his interest in securing the favor of the federal authorities to gain their assistance in avoiding having to serve a lengthy sentence for his state court convictions.

Substantial portions of Lemler's testimony were corroborated by other Government evidence. In addition to the independent evidentiary value of such corroborating testimony and documents, this evidence clearly bolstered the suspect credibility of Lemler as a witness. For example, the Government introduced the business card given to Lemler for use by Edward Resnick at his draft physical. The Government also introduced a record of telephone messages from Lemler's office (Government Exhibits 3, 3A), which tended to corroborate Lemler's testimony regarding Sangemino's activities, and his part in the Resnick case and other cases.[3/]

The quintessence of all three charges against Major Sangemino was the payment of a bribe. On this fundamental point, Lemler's testimony was supported by the testimony of other witnesses. Charles Mofschowitz, a retired cab driver who had been employed by Lemler as a chauffeur, testified that he had driven Lemler to 26 Federal Plaza, the building in which Sangemino had his office, on six or seven occasions. Mofschowitz also testified that, on two occasions, he delivered envelopes to Sangemino at his office and, on one such occasion, he knew that the envelope contained $300.00.[4/] Harriet Tollin, Lemler's daughter, testified that she had accompanied her father to 26 Federal Plaza on several occasions. Mrs. Tollin recalled that her father remarked on one occasion that "[h]e had to go to the crapper because that was the only place they could have privacy." (Tr. pp.513-14). Ruth Mear, an employee of Lemler, testified that she accompanied Lemler to Sangemino's office on one occasion but remained outside in a waiting area while Lemler and Sangemino met privately in Sangemino's office. She testified also that, on another occasion, she delivered an envelope to Sangemino on Lemler's instructions but did not know what the envelope contained. Lieutenant Petro testified that he too delivered a sealed envelope from Lemler to Sangemino.

Among the telephone messages from Major Sangemino to Lemler is an entry for June 15, 1971: "Thanks for tickets." Sangemino testified that Lemler had given him airplane tickets and vouchers which could be used on a vacation but that each time he had refused to accept them. Sangemino testified that this entry in the message book was inaccurate in that his actual response had been to express his appreciation to Lemler for the tickets, but that he could not accept them.

The jurors perceived readily the importance of the credibility issue and the independent value of the corroborating evidence. Ten minutes after the jury retired to begin its deliberations, the Court received a request to hear the taped conversation again. One hour later, the jury requested the exhibits relating to Lemler's telephone messages; the testimony of Mofschowitz; and Sangemino's own testimony regarding Lemler's gift of tickets for a vacation in Puerto Rico.

In sum, the Government's case against Major Sangemino was very strong, if the triers of fact viewed Lemler as a credible witness, or considered that they had received substantial evidence to corroborate his relevant testimony.

Challenging the Government's case against Sangemino, defendant's then trial counsel (hereinafter "Counsel") cross-examined Lemler for nearly two and a half days. Counsel reviewed Lemler's prior convictions, prior instances in which he had made false statements, his interest in obtaining assistance to shorten his incarceration on state charges, and pointed up various minor inconsistencies in Lemler's testimony.

Stated briefly, the defendant presented as witnesses: his superior, and fellow employees at New York City's Selective Service headquarters and at the Armed Forces Entrance Examination Stations at Fort Hamilton and Whitehall Street; draft counselors who had sought guidance from the defendant; members of the staffs of a deceased U. S. Senator and several Congressmen who had made inquiries of the Major regarding the Selective Service or military status of constituents; and character witnesses who knew the defendant through his employment or socially.

Major Sangemino testified in his own defense and controverted the testimony of Lemler that he had been engaged in any wrongdoing. Sangemino testified that it was his job to answer Selective Service registrants' inquiries about their eligibility for deferments.

We direct our attention to the claims of ineffective assistance of counsel, bearing in mind that "[e]rrorless counsel is not required, and before we may vacate a conviction there must be a 'total failure to present the cause of the accused in any fundamental respect.'" United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963). "The current standard of ineffective assistance of counsel in this circuit is that in order to be of constitutional dimensions the representation be so 'wholly inadequate 'as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'' United States v. Currier, 405 F.2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 914 ... (1969)." United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974). "[F]or there to be a lack of compliance with the fundamental fairness essential to due process, counsel's representation must be so 'horribly inept' as to amount to 'a breach of a legal duty faithfully to represent his client's interests' ...." United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970). See also United States ex rel. Maselli v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967).

Defendant contends that his representation at trial was inadequate because his counsel failed to call certain witnesses. Two witnesses who, it is now argued, should have been called, were

the defendant's daughter and son. The defendant's daughter would have testified that, by reason of her employment by an airline, she could have obtained airline tickets for her family at considerably reduced rates; from this, it is to be inferred that the defendant had no reason to accept a gift of airline tickets. On redirect examination, defense counsel asked Sangemino if he had ever asked Lemler for airplane tickets; Sangemeno replied that he would not ask for airplane tickets because his wife "is deathly afraid to fly." (Tr. pp. 1014-15). Sangemino was asked about the very subject that his daughter would have testified to, his lack of interest in receiving airline tickets; however, had she testified, two separate rationalizations would have been offered instead of one. This evidence would be at most cumulative and peripheral in its importance. We could not fault counsel for failing to bring out the opportunity of the daughter to obt in airline tickets at less than full price.

The defendant's son would have testified that he had asked his father to assist him on two occasions in obtaining a discharge from military service and that each time his father refused. Defense counsel began to question Sangemino about this on direct examination but, after an objection and a discussion at

the side bar, apparently decided, not unreasonably, that this line of inquiry would be counterproductive. (Tr. pp. 934-35).

Defendant also contends that two former commanding officers of the Armed Forces Entrance Examination Station at Fort Hamilton should have been called to testify about procedures at the Station, and show the difficulty inherent in any attempt to intervene in these procedures. Joseph Wirckler, a staff officer at Selective Service headquarters, testified concerning procedures at the AFEE Station. The Colonel then serving as New York City Director of Selective Service, who was defendant's commanding officer, testified regarding AFEE Station procedures; he and a Selective Service liason officer at Fort Hamilton each testified that Selective Service did not know in advance the names of the doctors who would be on duty for examinations for a particular day.

Likewise, defendant contends that his counsel should have called Lieutenant Colonel Nicholas DeMaria to testify regarding Army procedures in compassionate reassignment cases. But defense counsel questioned Major Robert Keup of the Albany, New York Selective Service headquarters on cross-examination and elicited responses substantially similar to the information contained in the offer of proof regarding Lieutenant Colonel DeMaria.

The persons who it is claimed should have been called as witnesses would not have directly rebutted the Government's case. During the course of the trial, the Court observed that certain areas of inquiry that, it is suggested here, should have been pursued, e.g. Sangemino's son's request for assistance in obtaining a discharge, were of dubious relevance and doubtful admissibility. In many instances, the testimony of these persons would have been cumulative. One person not called would have testified to Sangemino's good reputation among attorneys handling draft cases; several witnesses did testify concerning the defendant's favorable reputation. "Whe reviewing cases charging incompetence of counsel, ... [w]e are not conducting a seminar in trial procedures, at least where the tactics involved are those over which conscientious attorneys might differ." United States v. Garguilo, supra, at 797. "[T]he advisability of calling particular witnesses or the value of extensive cross-examination are matters open to honest differences of opinion.... It may well be that another attorney would have resolved these problems differently.... Yet this in no way suggests that [the defendant] has been denied a fair trial, or that the errors of counsel were so outrageously incompetent as to shock the conscience of the court." Id., p. 797. "[T]he decision to call or

bypass particular witnesses is peculiarly a question of trial strategy ... which courts will practically never second-guess." United States ex rel. Walker v. Henderson, 492 F.2d 1311, 1314 (2d Cir. 1974). See also United States v. Yanishefsky, supra, 1332; United States v. Matalon, 445 F.2d 1215 (2d Cir.), cert. denied, 404 U.S. 853 (1971).

Defendant next contends that his representation was incompetent because his trial counsel failed to prepare adequately certain defense witnesses. Witnesses D'Ambrosi, Cohen, Spiegelman and Winckler claim, in their affidavits, that they spent little time with defense counsel in preparation for their appearance in court. Spiegelman was prepared by counsel, but Spiegelman and the defendant now complain that counsel decided that it would be an effective trial strategy to have Spiegelman relate bizarre human interest incidents that occurred at the AFEE Stations. But, following accounts of registrants who had sexual fetishes and potential inductees who appeared at the AFEE Station with animals, and cases of mistaken identities, Spiegelman did testify concerning examination procedures and the nature of his communications as a liason officer with Selective Service headquarters.

Spiegelman's human interest testimony tended to increase the interest of the jury in his testimony in general, which was favorable to the accused. Spiegelman has testified in many federal criminal cases, usually as a Government witness. He is an experienced witness, who projects a genuine aura of integrity. We find no valid basis for criticism in counsel's presentation of Spiegelman's testimony. Often excessive pre-trial preparation and conference with such a truthful and intelligent witness tends to destroy his spontaneity, and has an adverse effect on the credibility and weight to be attached to his testimony. Sometimes it is better if a witness appear unprepared, so long as he appears to be and is truthful. In the case of the experienced witness, Spiegelman, no problem resulted.

Although the importance of trial preparation cannot be gainsaid, our concern is with counsel's performance at trial and "our inquiry is limited to 'the character of the resultant proceedings'." United States ex rel. Crispin v. Mancusi, 448 F.2d 233, 237 (2d Cir. 1971); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949). Although the questioning of the defense witnesses in this trial will not stand as a memorable model of trial advocacy, the examination of these witnesses was not so inept as

to approach the stringent standard by which we appraise the effectiveness of counsel on a motion for a new trial.

It is further asserted that defense counsel failed to qualify certain witnesses as character witnesses with the result that certain reputation testimony was not received. Specifically, defense counsel failed to qualify Mrs. Evelyn Cohen as a character witness under the requirement that the witness must show "such acquaintance with the defendant, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded." Michelson v. United States, 335 U.S. 469, 478 (1948). See also, Rule 405(a), F.R. Evid.; United States v. Augello, 452 F.2d 1135 (2d Cir. 1971), cert. denied 409 U.S. 859 (1972). Defense counsel attempted to elicit responses that would qualify Mrs. Cohen as a competent character witness by asking specific as well as general questions that would establish her familiarity with the views of others as to Major Sangemino's good character. The Court believes that Mrs. Cohen answered these questions truthfully. The function of trial preparation is not to metamorphose a witness who is truly incompetent to give the proffered testimony into one who will be able to testify. In any event, it was clear to the jurors

that Mrs. Cohen had shown up, along with others, to support the defendant's claim of innocence, and they doubtless thought she was prevented from doing so by the most mere legal technicality.

One incident during the trial is cited as the most outrageous sign of ineptitude. Defense counsel attempted to offer the grand jury testimony of Mrs. Leonora Resnick, a witness not yet called, as substantive evidence, before the Government had rested. All that may be said is that the incident occurred at the side bar and that ultimately Mrs. Resnick appeared and testified as a defense witness. No prejudice to the defendant ensued from this blunder, if it was that.[5/]

Defendant cites as another example of counsel's ineffective performance, his tactical treatment of Lemler's testimony regarding the Richard Falcoff case. First, it is claimed that defense counsel did not make a diligent attempt to locate and secure the attendance of Falcoff or his father as defense witnesses. The Court refused to admit the grand jury testimony of Richard Falcoff into evidence because counsel failed to make an adequate showing of unavailability and necessity. The Court observed that such effort which had been made to locate young Falcoff did not show diligence on the part of

defense counsel. (Tr. pp. 736-37). Second, it is charged that defense counsel's ineptitude was further demonstrated by his inability to have admitted into evidence Exhibit R, a letter reporting on an electroencephalograph taken on May 11, 1959 when Falcoff was nine years old. It is contended that this document was probative of relevant facts and, that it would have been admissible had a proper foundation been laid, presumably through the testimony of Falcoff or his father, or one of the doctors who had treated Falcoff for epilepsy as a child.

Defendant, by his new counsel, claims that trial counsel's failure to rebut Lemler's testimony regarding the Falcoff case was crucial. It is argued that the defendant could have shown that Lemler was not retained to assist Falcoff in procuring a draft deferment from Selective Service, but rather that Lemler's function was to place Falcoff in law school; that there was no reason for Falcoff to seek Lemler's assistance with a draft problem because he was eligible for a medical deferment arising out of a childhood history of epilepsy; and that this showing would have so damaged Lemler's credibility with the jury as to undercut whatever veracity the jurors would attribute to Lemler's testimony about his involvement with Sangemino in other cases.

Assuming that Falcoff could have been compelled to appear as a witness, and, since he was named as a co-conspirator in this indictment, he did not invoke his privilege against self-incrimination, and assuming further that he testified consistently with his grand jury testimony, it is doubtful that his testimony would have had the claimed effect. Before the grand jury, Falcoff testified that Lemler was to assist him in being admitted to law school but that he did not apply for admission until February 1972 for classes beginning in September of that year. Falcoff also testified that the last telephone contact that he or members of his family had had with Lemler had been in 1971, some time prior to his applications for admission to law school. Falcoff also testified that he had last seen a doctor for treatment of epilepsy in 1959 or 1960 and since 1967, he had taken medication for epilepsy on only two occasions. On cross-examination, Falcoff could have been confronted with inconsistent statements he had made in securing driver's licenses to the effect that he did not suffer from epilepsy (Exhibits 7 and 7A); his answer on Report of Medical History, Standard Form 89, made in connection with his pre-induction physical in Louisville, Kentucky on April 28, 1971 that he did not suffer from epilepsy; and the entry of the physician performing that examination that

Falcoff "denies serious illness." (Standard Form 89, Exhibit 6).

Since Falcoff did not appear as a witness, trial counsel was able to argue to the jury in summation (Tr. p. 1089):

> "The U.S. Attorney put into evidence the file which indicates that Falcoff was found unacceptable, RBJ, and Major Sangemino told you what RBJ means. It means return believed justified, and that the date given was when the draft board or local Selective Service Board was to refer him back down to the AFEES station for a return examination. However, by the time they got the orders out to him his number in the line had not been reached and he was placed in a holding category known as 1-H. So in fact he was not disqualified or not rejected from service. Certainly if Major Sangemino was going to wave his wand and do it, it would have been done at that time. What was the sense of bringing him back? It shows you that Falcoff is the normal procedure he was found not acceptable temporarily, to be returned in December of that year, but by the time they came back in December his draft number for that year's eligibility was over."

We do not infer from this argument that defense counsel abandoned his desire to introduce the grand jury testimony and Exhibit R, and decided on a new tactic. However, it appears that, considering the obvious peril of having Falcoff's testimony impeached, defendant was not prejudiced by the manner in which his counsel proceeded thereafter with respect to Falcoff.

Defendant also cites as an example of his trial counsel's incompetence, the failure to submit requests for jury instructions; particularly, that he failed to request an instruction that if a party fails to produce evidence which is under his control and reasonably available to him, then the jury may infer that the evidence is unfavorable to the party who would have produced it and did not. See E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §§12.15, 71.19. Lemler testified that he gave a card file listing his clients to Harriet Tollin; at trial, Mrs. Tollin denied being given the file. Other records, Lemler claimed, had been taken by the Attorney General of the State of New York. The Assistant United States Attorney stated that neither the State Attorney General nor the Nassau County prosecutor had this file. The Court need not determine retrospectively whether, if requested, the suggested charge would have been appropriate. There were significant grounds on which to base a finding that these records were equally unavailable to the federal authorities, and certainly were not within their control. See United States v. Brown, 511 F.2d 920, 925 (2d Cir. 1975); United States v. Super, 492 F.2d 319, 321-23 (2d Cir. 1974). The fact that a request was not made, under the circumstances presented here, hardly shocks the conscience of this Court.

Defendant also finds fault with his trial counsel's failure to move to strike as unresponsive an answer given by Lemler and an answer given by Harriet Tollin. On direct examination, when asked if Lemler said anything to her after meeting with Sangemino, Mrs. Tollin replied that her father had said that he had to go to the men's room to pay Sangemino his money. When asked for the precise words used, Mrs. Tollin did not mention the payment of money but only that they wanted privacy. When defense counsel adopted part of Tollin's unresponsive answer on cross-examination in a question challenging whether she had made the same statement in a prior interview with the Assistant United States Attorney, the question was designed to impeach her testimony on the very point of the payment of money. The risk that using her words would re-enforce her response in the minds of the jurors was clearly the risk inherent in the choice of this tactic.

Moreover, the use of a motion to strike in a jury trial poses a well-recognized dilemma for a trial lawyer; the harmful answer has already been given, if a motion to strike is granted, will the jury adhere to the Court's admonition to disregard the answer, or will making the objection merely underscore the damaging response and make defense counsel appear to the jurors to be hiding

relevant information? The making of a motion to strike is, therefore, a tactical decision to be weighed by counsel on the basis of his sense of the impression that the answer and his objection will have on the jury. R. Keeton, Trial Tactics and Methods, §4.15 (1973). The failure to move to strike the answers complained of in no way impaired the defendant's right to effective representation of counsel.

The Court has examined defendant's other examples of claimed ineptitude, some of which are as insignificant as an unartful choice of phrase.

The Court has also reviewed the entire trial record. Upon careful examination of the record and upon consideration of defendant's specific allegations, the Court finds that the claimed errors, "taken individually and collectively, United States v. Sanchez [483 F.2d 1052, 1058 (2d Cir. 1973)] fail to meet the 'stringent standards to be met to show inadequacy of counsel,' United States v. Maxey, 498 F.2d 474, 483 (2d Cir. 1974) .... United States v. Yanishefsky, supra, 1334.

We observe, as did Chief Judge Kaufman in United States v. Garguilo, supra, 797, that "[a] convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to

him proof positive of his counsel's incompetence." The impending imposition of sentence and the ability to study a trial record in the quietude of new counsel's offices combine now to provide perfect hindsight.

Defense counsel urges this Court to apply a less stringent standard than found in the decided cases. We are asked to do so in the interests of Justice, and in view of the widespread present concern of jurists and the bar to improve the quality of trial advocacy. The Court has declined to depart from the well-established law of this Circuit. See United States v. Yanishefsky, supra, 1333, n.2. See also, United States v. Ortega-Alvarez, 506 F.2d 455, 458 (2d Cir.), cert. denied 95 S.Ct. 1559 (1975). Since proof of Sangemino's guilt is overwhelming so that Patrick Henry reincarnate could not acquit him, this case is a poor one to blaze new trails.

The Court criticized counsel at the trial, and adheres to all that was said on the record. To present the full picture, however, more must be said. Finesse and guile were entirely absent in defense counsel's approach. This may be a very useful trial tactic in defending an innocent person, involving as it does, an

appeal to jurors on commonly perceived terms, based on an apparent longstanding personal friendship and high professional regard for this defendant, and that distaste for Lemler which any decent citizen would share. The Court believes defense coun[illegible] failed initially to perceive the weight of the Government's case against his client. Undoubtedly, a point came in the trial when his client's guilt began to dawn on counsel, but by then it was probably too late for a change in tactics.

Defense counsel gave an able summation; the Court said so at the time (Tr. p. 1216). Counsel projected himself to the jurors throughout as an upright and mature lawyer of absolute integrity, and indeed the Court now holds this view with respect to him. He communicated effectively to the jury by words and "Body English". His forthright mien with witnesses, the Court and the jury was excellent. He came through as an individual of integrity entitled to respect on the part of the jurors. His familiarity with armed forces procedure showed the jury that he too had served his country.

Insinuously, he placed his own integrity behind that of the defendant, and conveyed subliminally to the jurors by word and manner his absolute personal belief in Sangemino's innocence. This

common tactic among defense attorneys is difficult to pull off successfully, and apparently considered by some to be unethical. Code of Professional Responsibility, Ethical Consideration 7-24 Disciplinary Rule 7-106(C)(4), N.Y. Judiciary Law (McKinney's Supp. 1974).[6] Nonetheless, the legendary great advocates of the bar have always done it, and there is little a trial judge can do to prevent an attorney from endorsing personally his client's protestations of innocence.

Defense counsel also was adept in portraying himself, and his client, as the underdog, faced with the overwhelming power of the federal government, attacked and betrayed by such a worm as Lemler. He attempted, not entirely without success, to place the trial court in a position of appearing to acquiesce in perjury by Lemler and having a shared responsibility for the prosecution of such a fine man as his client. In short, although the representation was not the best, neither was it the worst.

Louis Nizer, a seasoned and successful member of our bar whose own advocate's skills have won him the deserved high regard of the public and his professional colleagues, has written a book, "The Implosion Conspiracy", New York, 1973, as an addition

to what he himself describes as "a river of articles, books and plays on the Rosenberg case, which has persisted for a quarter of a century."

While making an exhaustive analysis of the trial, and the level of advocacy there demonstrated by the Rosenbergs' devoted and dedicated attorneys, Alexander and Emanuel Bloch pere et fils, Mr. Nizer writes:

> "An accompanying phenomenon is what I shall call the analytical syndrome. It is possible to take the record of any trial and by minute dissection and post-facto reasoning demonstrate that witnesses for either side made egregious errors or lied. Then by ascribing critical weight to the exposed facts, the conclusion is reached that the verdict was fraudulently obtained.
>
> * * *
>
> The analytical syndrome can be used to discredit any verdict from the commonest automobile negligence case to the most involved anti-trust or proxy contest.
>
> The fallacy in this approach is that it assumes that all the evidence for the winning side must be believed by the jury, or it would not decide as it did. It ignores the jury's right to be selective of a witness' story and also the reality of conflict of testimony, which the jury must resolve by applying its common sense and keen observation of the witnesses. That is why the law is that not the larger number of witnesses for one of the parties determines the issue.

The jury may choose to believe one witness, and often does, against five witnesses who testified to the contrary.

The scales of justice are not laden on one side and empty on the other. If they were, we would not need trials and the complicated rules for measuring veracity. There are weights on both sides and they are not subject to precise evaluation. They must be measured by the values assigned to them in the jury's mind. Jurors often have seven senses, adding horse and common to the usual five.

Nor does it follow that because there is alloy in some of the pieces of gold on one side of the scale that the jury's recognition of its meretricious nature requires it to ignore the decisive tipping of the scales from other weights on the same scale. The opposite scale might be lighter, too, if it were not for some artificial weight." (Quoted from pp. 14-15 of Fawcett edition. All page references to the "Implosion Conspiracy" are to that paperback edition.)

Again, (p. 129) Nizer writes:

"Those who argue for or against the [Rosenberg] verdict do so on the record before them. What is missing is what the record might have been. Jurors must decide on what is put before them. They cannot respond to stimuli which are not there. That is why it is possible for a good case to be lost and a bad one won.

No mystical power places all the facts into the courtroom for the jury to weigh.

> The theory that heaven would provide the answer permeated trial by ordeal. Where men must do so, the facts must be reconstructed by diligence and research. Cross-examination must excise the truth from a hostile witness' mind. Experts must be engaged to present the defense's side of a scientific postulate. ...
>
> Does this mean that justice depends partly on the skills of the advocate? Of course. We would prefer it to be an abstract procedure vested with sublime certainty. But justice is administered by human beings and the variations in their abilities affect the outcome as they do in every other enterprise. While acknowledging our regret that justice is not an infallible edict from on high, we can take solace from the fact that no better system of determining controversy has ever been devised."

Although our judicial system is concerned justifiably with maintaining the quality of the adversary system of justice and in protecting the right of a criminal defendant to representation by counsel, it is doubtful if a Court should fashion some analogue to the exclusionary rule of evidence. That rule, in criminal cases, punishes society in general, and the prosecutor, in that it allows the guilty to go free because of improper conduct by law enforcement officials in obtaining evidence. See dissenting opinion of Mr. Justice Brennan in United States v. Peltier, 43 U.S.L.W. 4918, 4922 (U.S.S.C. June 25, 1975). So

long as the result of the trial does not shock the conscience of the Court or create a farce, no purpose would be served in granting a new trial as a deterrence against incompetent counsel.

A rule premised on deterrence that would award a new trial to a defendant found guilty on the evidence presented to a jury because his counsel's representation was not of the highest calibre simply rewards incompetence. A crafty defense lawyer, confronted with a sturdy prosecution case, would be advised to feign incompetence and seek a retrial at a later date. Clearly, such a result would hardly serve the interests of justice. Granting a motion for a new trial based on the incompetence of counsel is best reserved for situations which truly shock the conscience of the Court and where it might truly be said that the defendant has been deprived of a fair trial.

Incompetence of the bar generally, if it is to be corrected at all, must be done by improved initial education, stiffer admission requirements, and more continuing post-admission legal education. Furthermore, counsel's competency is a function of the case he is trying; most lawyers are perfectly competent to try the general run of criminal cases where the proof is often overwhelming, and the only available trial tactics are to create

sympathy, bias against the prosecutor, or some other inducement to juror nullification.

II

Defendant contends that he is entitled to a new trial because the Assistant United States Attorney failed to turn over copies of the grand jury testimony of Richard Falcoff and Norman Falcoff, his father, until the day before the trial commenced. Defendant contends that, under Brady v. Maryland, supra, this delayed disclosure necessitates a new trial. We disagree.

The Government did disclose the grand jury testimony on the eve of trial. Since the imperative of the Brady rule is directed to insuring adequate trial preparation, United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied 411 U.S. 982 (1973), the Court does not view the fact that disclosure was ultimately made before the trial started as being dispositive of defendant's claim. However, such disclosure is a matter to be considered in determining this branch of defendant's motion.

The tests applicable to a new trial motion were restated in United States v. Rosner, 516 F.2d 269, 272 (2d Cir. 1975):

> "[T]he standards governing a motion for a new trial based on evidence available to the government before trial vary according to the government's conduct relevant to the information. If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, 'a new

> trial is warranted if the evidence is merely material or favorable to the defense.' United States v. Kahn [supra, 287]. However, when the government's failure to disclose is inadvertent, a new trial is required only if there is 'a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.' Id. United States v. Miller, 411 F.2d 825, 832 (2 Cir. 1969); see United States v. Keogh, 391 F.2d 138, 147-48 (2 Cir. 1968)."

On January 30, 1975 and on February 10, 1975, the Assistant United States Attorney showed the defendant a report of Dr. Piluto, dated May 11, 1959, which states that Richard Falcoff may have an epileptogenic focus in his brain. On the same dates, the defendant was shown Falcoff's Selective Service file containing forms from a pre-induction physical examination conducted in Louisville, Kentucky, one of which bears the notation that Falcoff suffered from petit mal epilepsy and was receiving medication. It is evident that the Government did not deliberately suppress exculpatory evidence relating to the Falcoff case.[7/]

Furthermore, it does not appear that the Assistant United States Attorney ignored evidence of such high value that it could not have escaped his attention. Were this true, we would be warranted in applying the less stringent standards followed in cases

where sanctions are deemed appropriate. The fact that Falcoff had been treated in childhood for epilepsy, and that this had been noted at his Louisville physical, at which time a recommendation was made that he be recalled in one month's time, were matters of real evidentiary value and they were disclosed. As has been previously noted, the Falcoff grand jury testimony, replete with inconsistencies concerning his medical history and the nature of his involvement with Lemler, was of dubious evidentiary value, which a prosecutor might readily have bypassed in discharging the duties imposed by the Brady rule. See United States v. Rosner, supra, 272.

We, therefore, apply the test, set out in United States v. Miller, supra, whether there is a significant chance that more timely disclosure would have permitted skilled counsel to develop this information in such manner as to have induced reasonable doubt in the minds of the jurors. See United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975) and cases cited at n.9 therein.

In the bill of particulars, the Government identified Falcoff as a client of Lemler whose case might become an issue at trial. Thereafter, Selective Service and medical materials relating

to the Falcoff case were made available to and were studied by the defendant. Thus, the crucial underlying facts were disclosed well in advance of trial.

Although clearly not statements governed by 18 U.S.C. §3500, the grand jury testimony was provided in time to yield information for use in the cross-examination of Lemler. We have noted (supra, p.21) the tactical difficulties that might have been encountered had Falcoff been located and subpoenaed to testify here. Even assuming that Lemler's credibility could have been damaged further in a contest of oaths with Falcoff, who, it should be noted would also have been an interested witness of suspect veracity, there remained the inculpatory testimony of Mofschowitz, the recorded conversation between Lemler and Sangemino and considerable circumstantial evidence which Falcoff's testimony could not have overcome. See United States v. Rosner, supra. Cf. United States v. Seijo, supra.

There is no basis for inferring that had more prompt disclosure been made, skilled defense counsel might have utilized the additional knowledge to be gleaned from study of the grand jury testimony in preparation for trial, and thereby induced a reasonable

doubt in the minds of the jury, avoiding conviction. The Government disclosed the material facts pertaining to the Falcoff case. Disclosure of the grand jury testimony itself earlier would not have been a significant addition to the defense arsenal. Cf. Grant v. Alldredge, 498 F.2d 376 (2d Cir. 1974).

Defendant also argues that his trial counsel was incompetent in that he failed to request Brady material. At a pre-trial conference, defense counsel requested court-ordered disclosure of all grand jury materials and this request was denied. The Court attributes no significance, under the circumstances presented here, to the fact that a specific request for Brady material was not made. Throughout the pre-trial stage, the Government acknowledged expressly, its Brady obligations. The identification of Brady material and its disclosure remain the responsibility of the prosecutor. There is no basis for inferring that, had a more specific request been made, more prompt disclosure would have been achieved since the identification of Brady material is preliminarily a matter for the prosecutor's judgment.

Defendant's motion for a new trial, pursuant to Rule 33, F.R.Crim.P., is in all respects denied.

So Ordered.

Dated: New York, New York
September 25, 1975

CHARLES L. BRIEANT, Jr.

CHARLES L. BRIEANT, JR.
U. S. D. J.

## F O O T N O T E S

1. Mrs. Leonora Resnick testified. She admitted she had retained Lemler to place Edward in medical school, but testified that she did not ask Lemler to do anything in connection with Edward's draft status because she believed at that time Edward would be deferred because he was overweight. The Government introduced a photocopy of a contract between Lemler and Mrs. Resnick which was signed by Lemler, and which Mrs. Resnick testified that she had signed on the original counterpart. (Ex. 1). That contract provided that in consideration for the payment of $10,000.00, Lemler would place Edward Resnick in an accredited medical school in the continental United States. It further provided "that it shall be the responsibility of Dr. Nathan Lemler for Remedial Education, Inc. to successfully handle and process all selective service probelms connected with the candidate, for the lifetime of this contract." If Resnick were unable to attend medical school because he had been inducted into the armed forces, regardless of whether or not he had been accepted by a medical school, the contract provided for a full refund.

2. The transcript includes the following:

Major S: See, see, the thing is, did you, did you tell anybody that you gave me money?

Lemler : Well, I didn't tell them that I gave you money per se.

Major S: Yeah.

Lemler : But I marked in my records how much each case cost me.

Major S: Yeah.

Lemler : Ah, ah, you know, and if I ... if I spent ah, $500.00 or $300.00 at Selective Service, this is marked in my record.

Major S: Yeah, but can't you say that, ah, that you were trying to justify to the people, you were trying to justify to the guy the ... the work you were doing? That it wasn't payment to Selective Service. You know what I ....

Lemler : I could say that.

Major S: (Unintelligible 1 second)

Lemler : If, if that's, you see, we, to tell a consistent story....

* * *

Major S: Listen. You see, the thing is, this is that, ah ... you ... you charged the guy something for handling the whole thing.

* * *

Major S: Nat ... Nat ... look, Nat, please. The thing is that, ah, you said you know you charged people something. Now you, in other words, you charged them for the medical school and you charged them for your work with Selective Service, how

hard you have to work with Selective Service, how many times you have to go back. Not that you gave me money.

Lemler : Yeah, but you see, the idea is this; did you at any time make a deposit in a bank?

Major S: Never.

Lemler : After I saw you?

Major S: Neve[illegible]here was no one, not even, you know, like, ah, for a cancelling a check. Nothing.

Lemler : In other words, if they, if they find out that I visited you on the 15th of the month or the 17th of the month, any day that's not payday, for you, you didn't, ah ... make a deposit or put, ah ... some money in a box or something.

Major S: No. If I did, I could probably explain it. I mean, in, in a bank. Sure, I could possibly explain it.

Lemler : Thank you. Because, you see, I don't know what records of mine they're digging for.

Major S: All right, but the only thing is that you come up and you saw me. Now, the only thing is, I told you that you know you had to go get this paper, you had to go ... that papers ... you had to get the other papers.

Lemler : Yes.

Major S: No, what you had to do is, you had to spend traveling and taxis and money and everything else. I mean, you can put down something in the paper to indicate that what you were doing is to, ah ... for ... for the work involved, sometime it took you far away.

Lemler : Because you see, I don't want, ah ... ah ... to be telling a different story than you're telling.

Major S: Well, you ... you shouldn't be. Let's tell the truth.

Lemler : Well, the truth is, Bill, that I, ah ... that I laid out money up here and that I, and, ah ... I don't want to make a different story.

Major S: You ... you have ... look, you have costs.

Lemler : Yes.

Major S: You ... you come down, ah, ah, like say, for example, you had to get ... say for example, the guy had a, ah ... medical letter he needed, ah, you the way you took care of all his problems, you went out, you got the medical records, you got....

Lemler : All right. Now, for example, I went to Doctor Teitelbaum for something like that.

Major S: All right, so you had to lay out money, you had ... you had to pay the doctor for the letters, you had to, ah ... or your time involved. Ah, for those things.

3. Excerpts of these messages are illuminating:

"January 26, 1971 -- Maj. called - 'his friends were out today because of the weather.' They did everything they could for Chas. Chas. Shevin called - plans went awry - Dr. L [Lemler] spoke with Maj."

"February 24, 1971 -- Maj. Sangemino - Call Local Bd #5 - IV3-8772 - Miss English or Miss Barabash - Close member of family assure that Ed. Resnick will be going to medical sch." (Ex. 3A).

Lemler testified that he called Local Board #5 and informed them that Resnick would be going to medical school; Lemler is not related to Resnick. A recurring issue in the trial was whether, apart from the claim that he accepted money from Lemler, Major Sangemino, as to the registrants, was merely performing his duty as an officer in the Selective Service headquarters in New York City. But see, United States v. Manton, 107 F.2d 834 (2d Cir. 1938). The Government attempted to demonstrate that by intervening on behalf of Lemler's clients, Sangemino was not acting within his geographic jurisdiction. Resnick's Local Board #5, referred to by Lemler and mentioned in the telephone message quoted above, was located in Nassau County and was not within the jurisdiction of the New York City headquarters to which defendant was assigned.

4. Four volumes of books maintained by the General Services Administration for security purposes at the doorways to the federal office building at 26 Federal Plaza were introduced as Exhibits 10-13. Although these volumes represent but a segment of the listing of visitors to that building during the period covered by the charges in the indictment, they do prove that Mofschowitz visited the building on June 15, 1971, and that Lemler visited the building on several occasions during this time period.

5. The Court views this incident as some indication of ineptitude to be considered in evaluating the quality of defense counsel's representation. We would not overlook, however, the possibility that what appears now to be ineptitude, was a ploy by which counsel, while the matter was fresh in the jurors' mind, wanted to show the jury that he had something relevant, exculpatory and important which he wanted to bring out concerning Mrs. Resnick. Not every offer of proof, or question or objection is taken on the tactical basis that the attorney doing so believes that the ruling will be in his favor. Furthermore, it is possible that the Court might have erred and permitted this offer, or indeed, that the Government might have failed to object, or consented to the exhibit being offered at the time. In sum, no great emphasis can be placed upon this incident.

6. Ethical Consideration 7-24 reads in relevant part as follows:

> "The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. *** However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters."

Disciplinary Rule 7-106(C)(4) states that:

"In appearing in his professional capacity before a tribunal, a lawyer shall not:

> Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

7. Defendant's trial counsel acknowledged, in a side bar conference concerning the admissibility of the 1959 report of Dr. Piluto, that "Harris [the prosecutor] has been most forthright in his information given to me." (Tr. p.898).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

-against-

WILLIAM SANGEMINO

No. 74 Cr 938
75 Cr 127

AFFIDAVIT

----------x

Michael B. Pollack, being duly sworn, deposes and says:

1. I am the attorney for WILLIAM SANGEMINO in the above-captioned case.

2. This affidavit is being submitted in furtherance of the defendant's motion for a new trial based on newly-discovered evidence, evidence which should have been turned over to the defendant pursuant to Brady v. Maryland was not turned over, and the failure to produce statements pursuant to 18 USC 3500.

3. Nathan Lemler testified in Newark, New Jersey, before the Honorable H. CURTIS MEANOR, in the case of United States v. John DiGilio et al., 74-314, on June 6, 11 and 13, 1975. During this testimony Lemler stated that he met John DiGilio at the West Street Detention Facility. Both were locked up in the hospital wing of the facility. Lemler

testified that he and DiGilio were associated between late summer and Thanksgiving of 1974, when DiGilio was moved out of West Street. Lemler stated that he was approached by DiGilio within an hour of their initial meeting, to help teach DiGilio how to feign medical illness which would establish his incompetence to stand trial. Lemler thus commenced teaching DiGilio how to feign cynocopal attacks, fainting spells, and petit mal epilepsy. Tr. June 13, 1975 at pg. 36. Lemler also states he continued to be known as "Doc" during his stay at West Street.

4. Nathan Lemler further testified that he told Assistant United States Attorney Jeffrey Harris of this agreement with DiGilio immediately, June 6, 1975, Tr. pg. 46; June 11, 1975, Tr. pp. 145, 146; June 13, 1975, Tr. pp. 72, 79, and Mr. Harris states in his letter of September 30, 1975 that he contacted the United States Attorney in Newark, New Jersey immediately. Mr. Harris fixes the date of this disclosure and subsequent contact as being "on or about September 19, 1974," at least five months prior to Major Sangemino's trial. Mr. Robertson, the Assistant United States Attorney from New Jersey, represented to the Court that his notes indicated the conversation occurred on October 22, 1974. June 13, Tr. pg. 7. Despite the obvious discrepancy between the two assistants, it is also relevant to note that the

defense was not provided any statements of Nathan Lemler for either of those dates.

5. Nathan Lemler testified at the hearing that his business worked on a total refund basis. Any client who was not satisfied with the results or Lemler's efforts on his behalf was entitled to a total refund. Lemler stated, "I have records to indicate that over this four year period I have refunded better than a half a million dollars." June 11, 1975, Tr. pg. 11. Such records were never produced for the defense of Major Sangemino.

6. During the course of these proceedings the defense has continuously requested that reports by the Federal Bureau of Investigation be turned over. Except for a reply to a communication to the University of Rome made by the FBI, the existence of such material has been denied by the prosecutor. On June 11, 1975, Lemler testified that he had written at least ten (10) letters to the FBI and was in fact visited by an agent shortly before Christmas, 1972, and that the FBI took no action in his behalf after this meeting. Tr. pg. 29, 30. Lemler further testified that he told his entire story, subsequently told to Mr. Harris in 1974, to agents of the Bureau of Narcotics and Dangerous Drugs in 1973. June 11, Tr. pg. 65.

7. Nathan Lemler testified in the following manner on June 11, 1975:

Q. Where was the bribery committed?

A. All over the country except New York State, Sir. Chicago, Tennessee, Louisville, California.

Q. So you say now that you committed bribery all over the country?

A. Yes.

Q. All but in New York?

A. Yes, Sir.

Q. You did that personally, I take it?

A. I don't know what you mean, Sir.

Q. Well, I mean you were the one who made the bribe? You didn't send someone to do it"

A. I had employees but I am solely responsible for that, Sir.

The Court: You said the other day, if I understood you correctly, t at the bribes were in connection wi draft exemptions, draft deferment, things of that nature.

The Witness: And medical school and dental school acceptances.

The Court: All right.

Q. These bribes, then, were around the country?

A. Yes, Sir.

Tr. ppg. 37, 38.

WHEREFORE, your deponent respectfully submits that the testimony of Nathan Lemler in New Jersey sets forth evidence which so taints his prior testimony and the compliance of the prosecutor with court orders and directives as to mandate the granting of a new trial for William Snagemino. The Supreme Court stated in Mesarosh v. United States, 35 U. S. 1, 9 (1956), "The dignity of the United States Government will not permit the conviction of any person on tainted testimony." The testimony establishes that during September, October and November 1974, during the period William Sangemino was under indictment, Nathan Lemler was giving medical advice to a federally incarcerated prisoner as to how he could avoid his date with justice, Lemler gave such advice based on his medical knowledge and research done in the institution. This guidance was given by Nathan Lemler alone and severely undercuts his testimony against William Sangemino that needed the help of others to avoid the draft. One who could teach an inmate sufficient symptoms of illness so as to confuse court appointed experts certainly could have done the same with young men facing this army physical. Such testimony so severely undercuts Nathan Lemler's rationale for his need of William Sangemino so as to undercut the entire thrust of his testimony. Lemler's testimony and statements by Mr. Harris and Mr. Robertson indicate a discrepancy as to when the prosecutor became aware of Lemler's conduct. Taking either date, or both, September 19,

1974 or October 22, 19 as being accurate, it is clear that on those dates Lemler was interviewed, yet no statements were turned over to the defense for Lemler on those dates. Lemler testified that he fixed 400 of 401 draft cases, and knew the figures to be correct because he kept 3 x 5 cards, which were now missing. Yet $500,000 was refunded due to failure of Lemler to satisfy his clients. Those records were never produced. Lemler further depicts efforts on his part to contact the FBI by letter, and finally being interviewed by the Agency. The United States Attorney continuously denies any participation by the Agency in this investigation. Lastly, Lemler states that his briberies were around the country - everywhere, except New York. These instances of Lemler's testimony and conduct shortly after Major Sangemino's conviction state loud and clear that the conviction is tainted and a new trial must be granted.

JH:ko

September 30, 1975.

Honorable Charles L. Brieant, Jr.
United States District Judge
United States Courthouse
Foley Sq.
New York, N.Y. 10007

Re: United States v. Sangemino
74 Cr. 928 & 75 Cr. 127

Your Honor:

Pursuant to your direction on September 26, 1975 the following information is hereby provided to the best of my recollection. On or about September 19, 1974 Nathan Lemler was present in the office of the United States Attorney for an interview. On that occasion Lemler stated that an inmate in West Street Detention facility had discussed feigning incompetence with Lemler. I ascertained that the person in question, Mr. Di Gillio, was awaiting trial in the District of New Jersey. I immediately called the United States Attorney's office for the District of New Jersey and spoke with the Assistant United States Attorney in charge of the case. I told him what Lemler said to me and then put Lemler on the phone with the Assistant. After Lemler finished talking with the Assistant I got back on the phone and the Assistant told me that if he needed anything further regarding this matter he would get back to me.

Shortly thereafter, the Assistant from New Jersey called and requested an interview with Lemler. However this never took place due to scheduling problems. Several weeks before trial the Assistant in New Jersey called me and stated that after I was finished with the trial in which Lemler was to be a witness he'd like to talk to Lemler. I told him that I would let him know when the trial was concluded.

Upon the completion of the trial I informed the Assistant in New Jersey that the trial was over and

JH:ko

To: Honorable Charles L. Brieant, Jr. -2-

on or about June 4, 1975 Lemler was interviewed in the United States Attorney's office in the District of New Jersey. He subsequently testified at a competency hearing in that District.

Very truly yours,

PAUL J. CURRAN
United States Attorney

By: _____
JEFFREY HARRIS
Assistant United States Attorney

cc:

Michael B. Pollack, Esq.
1345 Avenue of the Americas
New York, N.Y. 10019

Jonathan L. Goldstein, Esq.
United States Attorney
District of New Jersey
P. O. Box 330
Newark, N.J. 07101

JH:ko

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

WILLIAM SANGEMINO,

Defendant.

AFFIDAVIT IN OPPOSITION

74 Cr. 928 & 75 Cr. 127 (C.L.B.)

STATE OF NEW YORK )
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JEFFREY HARRIS, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and as such have been assigned the responsibility for the above-captioned matter.

2. This affidavit is submitted in opposition to the defendant's motion for a new trial.

3. The defendant's motion is based upon the testimony of Nathan Lemler in a competency hearing in the case of United States v. Di Gilio in the District of New Jersey. This hearing was held on several days between June 6, 1975 and June 13, 1975, almost two months after the jury found Sangemino guilty on all counts. At the hearing in the Di Gilio case, Lemler testified in sum that in the fall of 1974 he counselled Gilio to feign incompetency while both were confined in West Street.

4. Defendant claims that he was not provided with any of Lemler's statements regarding the Di Gilio incident pursuant to Title 18, United States Code, Section 3500. Assuming arguendo that he was entitled to such statements the simple fact is that no such statements exist. On or about September 19, 1974 when Lemler told me about Di Gilio no notes were made, and none were thereafter made. The only action taken was to telephonically notify the United States Attorney's Office in the District of

New Jersey of the incident. I have been advised by Assistant United States Attorney William Robertson in the District of New Jersey that he made no notes of his telephone conversation with Lemler on that date and made no notes until he interviewed Lemler after the verdict in this case.

5. The defendant next claims that he was entitled to know about the Di Gilio incident pursuant to the doctrine first announced in Brady v. Maryland 373 U.S. 83 (1963). He reasons that this information would have shown that Lemler had medical expertise and hence did not need Sangemino in getting Selective Service deferments. This argument lacks merit for two reasons. First, at the Di Gilio hearing Lemler stated that his "medical expertise" was based upon his chiropractic degree and reading certain medical texts in West Street. Lemler's chiropractic degree as well as his Phd in biochemistry were known to defense counsel and fully explored during the course of Lemler's cross examination. Hence Lemler's "medical expertise" was known to the defense at the time of trial. (i.e. Tr. 184-191). Second, and most important, the Government never claimed, nor did the proof show, that Sangemino's part in the scheme was to provide Lemler with medical expertise. Sangemino's contribution to this corrupt enterprise lay in the fact that he was a high offical in Selective Service headquarters with expertise in the functioning of the Selective Service System as well as contacts in the System and the U. S. Army.

6. Defendant also excerpts a portion of Lemler's testimony in the Di Gilio hearing presumably to attempt to demonstrate that Lemler recanted his testimony as given in this case. This suggestion is pure nonsense. The portion excerpted by counsel when taken in context reveals that Lemler was being cross-examined concerning why he went to federal authorities instead of local

JH:ko

authorities with information concerning bribery. Lemler is explaining that the local authorities didn't have jurisdiction. Any ambiguity raised by this excerpt is removed later on when Lemler admits that he bribed Sangemino and was indicted as an unindicted co-conspirator (Trans. 6/13 pp. 19-20). Lemler's testimony, where it refers to this case, is entirely consistent with his testimony at trial. For example, he testifies he got Resnick out of the Army (Trans. 6/11 p. 102), and that the fees for his medical school placements were higher than for Selective Service (Trans. 6/11 p. 137). There is no new evidence in Lemler's testimony at the Di Gilio hearing which entitles Sangemino to a new trial.

WHEREFORE, the Government respectfully requests that the defendant's motion for a new trial be denied in all respects.

JEFFREY HARRIS
Assistant United States Attorney

Sworn to before me this
21 day of October 1975

* * *

A Fully, sir.

Q Did you in fact train Mr. DiGilio?

A I tutored him or mentored him, yes, sir.

THE COURT: What is your background. How do you know how to feign mental symptoms?

THE WITNESS: I have a degree, I'm a doctor of chiropractic science.

MR. ROSEN: If I might, this might help clear things up also.

THE WITNESS: I also had access, as did anybody who is around the hospital compound, to the books on the shelves such as Merck's manual, Boise pathology and Best and Taylor's physiology.

We had access to the libraries.

Q I show you now government Exhibit G-1 for identification.

A Yes.

Q Do you recognize that?

A Well, I recognize the book but not this book.

I used a much older edition than this. And from it I would read from time to time, and then I would point out for John to read, and then I would explain the terminology that he indicated unfamiliarity with.

Q Would you please examine that volume and please tell me if that's the same volume you had at West Street Detention Center?

A No. [illegible] volume.

Q Would you look at the name in the beginning of

* * *

* * *

As a matter of fact, adjoining the hospital [illegible] where the beds were is a washroom with shower, toilet, sink and mirror, and he would even perform in front of the mirror.

Q What types of things would he practice doing?

A Well, he'd blank expressions, he'd eye stare at himself and expressions of pain, he would vomit over the toilet.

Q How would he do that?

A He'd stick his finger down his throat and heave, because one of the things that we discussed was the projectile vomiting symptom that indicates a possible brain tumor which is in the book.

THE COURT: Was he able to achieve porjectile vomiting?

THE WITNESS: No.

Q You are not in fact an expert in psychiatry, are you?

A No.

Q But you are able to read and understand to a degree certain of the terms --

A And what I didn't understand I had access to Tabors dictionary. That's a medical dictionary.

Q How long did this [illegible] continue?

Direct

A Over his entire stay, sir.

Q Approximately how long was that?

A Several months, but he had been absent from the hospital because he had been taken to other hospitals for a period of hours as a result of injuries received during falls that he accomplished while there.

Q Were these self-inflicted, to your knowledge, the falls?

A The falls were self-imposed. The injuries were --

THE COURT: What was in it for you in all this?

MR. ROSEN: If the Court please, I'm getting to that.

THE WITNESS: I was promised --

MR. ROSEN: If the Court please --

THE COURT: I will withdraw the question.

Q Was Mr. Digilio a good learner?

A An excellent student, sir, but I thought he overacted.

Q What do you mean by that, sir?

A Well, there is a difference, in my opinion, between acting and burlesquing, and his performance was, in my opinion, much more of a burlesque.

Q Did you ever caution him that perhaps he was going a bit too far?

* * *

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* * *



Q Tell the judge if you recall what some of those symptoms were?

A Well, again I would read -- he would read and I would point out memory lapses, symptoms of memory lapses, and again the petty mal-symptom of stopping whatever you were doing or saying at the moment and just staring blankly at the person with whom you were talking, and then renewing as if nothing had happened, that kind of thing.

Q Did there come a time when Mr. DiGilio was confined to a wheelchair?

A Sir, after his first fall he was told not to leave the wheelchair, and of course, in his trips around the prison, which were daily, he used it, but he got out of it, he was back in our area, and couldn't have fallen had he confined himself to the wheelchair.

Q Did Mr. DiGilio ever take drugs that were not prescribed?

A Yes, sir.

Q How would he get those drugs?

A Well, that's a difficult question because, you said drugs which were not prescribed --

Q To him.

A Medicines were prescribed to him, in addition to this he had many friends on the pill line.

* * *

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* * *

A He's not in this courtroom now, sir.

Q Can you describe him?

A Yes, sir.

Q What did he look like?

A Good-looking chap, I would say, in his mid-thirties, mustache, nice dresser. I don't know how to physically describe someone, sir. Tall, well-built.

Q Particularly fat, particularly thin?

A I would say heavy, sir.

Q Did he have short hair, flat top, balding?

A He was not bald, sir. He was not bald.

Q What type of a hairstyle was it?

A Moderate.

Q What was the nature of that conversation?

A Well, I don't know what took place between the two of them until I got there.

Q After you arrived.

A When I got there I went into some detail about my particular predicament. I had explained it to him the circumstances under which I was in a federal prison, that the United States Attorney was attempting -- had uncovered some evidence of my innocence in the investigation, that he was currently conducting, and I was trying to get what is known as a coram nobis motion prepared for me.

Q Were your legal problems discussed?

A Yes, sir, at some length.

THE COURT: Wait a minute. You were in federal penitentiary, you told me, because you were there to be a witness in some pending federal case?

THE WITNESS: Yes.

May I explain that?

THE COURT: You had been in the New York State Prison?

THE WITNESS: Twenty days.

THE COURT: For second-degree larceny?

THE WITNESS: Second-dregree larceny, yes, that's right.

THE COURT: What did the U. S. Attorney have to do with that?

THE WITNESS: All right, sir.

As a consequence of my conviction, prior to my conviction I had gone to the United States Attorney voluntarily and because I had learned from my defense counsel, Herman Greenberg, that a portion of the record of my case, the evidence in my case was not going to be permitted at the courtroom.

If I may try to explain this, sir, I was found guilty of allegedly taking money from parents promising to put their sons into medical school, failing to put their sons into medical school and failing to return the

money. This was the ground for my charge.

The fact was that I had a collateral agreement with these people that failing to place their sons into medical school I was to keep them from entering the military service through bribing of military officials.

This portion was not going to be admitted to the trial.

THE COURT: Trial on the second-degree larceny?

THE WITNESS: Right. So that the jury would never have any way of knowing that there was a collateral agreement. Consequently, my failing to return the money for not placing their sons in medical school would on the face of it appear to be a larcenous act.

When I reported my activity in its entirety to the United States Attorney, he conducted an investigation and found that everything I had told him was true.

THE COURT: When did you report to the U. S. Attorney, before or after your trial on the state charge?

THE WITNESS: The day it started, sir.

THE COURT: The day the state trial started?

THE WITNESS: Yes, sir.

He conducted an investigation and found that prior to my trial, sir, during the investigation that led to my indictment, four cartons of records were taken from my office.

THE COURT: You were a practicing chiropractor at that time?

THE WITNESS: No, sir. My wife and I had a tutorial school.

MR. QUERQUES: I didn't hear that.

THE COURT: Tutorial, tutor.

THE WITNESS: All secondary and college and graduate courses. We had a staff of seventeen teachers.

THE COURT: All right.

THE WITNESS: All of my records were taken from my office and they filled four cartons at the prosecution table. At the time of my trial only two cartons appeared. Through my attorney we issued a subpoena duces tecum for the other two cartons.

The Attorney General investigator who removed the cartons testified under oath at my trial that he only took two cartons.

After my conviction, subsequent to my conviction but prior to my sentence, the other two cartons were found. As a result of those cartons and other investigative records available to the United States Attorney, indictments were sought and conviction. So far one convicton, sir, of a military official, and there are others now pending.

THE COURT: What happened to your appeal from the state court conviction?

* * *

Q I show you, Mr. Lemler, marked government Exhibit 3 for identification.

Would you please describe it?

A This is it.

Q This is what?

A The piece of paper he gave me.

Q Can you read what it says on there?

A John DiGilio, 144 Sullivan Street, New York, 691-6980, Vinnie.

Q Is that, in fact, the slip of paper that Mr. DiGilio gave you?

A Yes, sir.

Q Subsequent to your in-person meetings with Mr. Hochheiser, did you ever speak with him on the telephone?

A Quite a few occasions, sir.

Q Approximately how many times did you speak with him on the telephone?

A I would say two or three times in his office and probably eight to ten times at his home.

Q Where was his home located?

A Westchester County.

Q How do you know that?

A Because it has an area code of 914.

He had given me two home telephone numbers, and he told me if I found a busy signal on one to call him at

the other.

THE COURT: Mr. Hochheiser?

THE WITNESS: Yes, sir.

THE COURT: Two numbers?

THE WITNESS: Yes, sir.

THE COURT: Both 914?

THE WITNESS: Yes.

Q Did you, in fact, call those numbers?

A I surely did.

Q Where did you make those calls from?

A The telephone we earlier spoke about.

MR. QUEROUES: I'm sorry, I didn't hear you.

Q Which telephone?

A The one on Mr. Marzano's desk.

Q Do you recall the substance of any of those conversations?

A Well, Mr. Hochheiser had told me that on the third time I had seen him. We had gone into that.

Q Let's go back to that third meeting.

A That he wanted to be kept aware. He was only with me a few minutes.

Q When did that third meeting occur?

A Oh, I would say, about a week; certainly not more than ten days after the second meeting, where he told me he had already picked up the thousand dollars.

I had left that out, sir.

The first occasion when John was present, John told him -- I do not remember the place, but he told him to go some place to pick up one thousand dollars; that that was to be a start in my case. And he was pretty gruff about it and ordered him to go over that and said -- and wanted no bullshit, and that this matter had to be entered into right away.

By the time the third visit came around, he told me that he picked up the thousand dollars. Mr. Hochheiser told me that he picked up the thousand dollars.

Q Was the third meeting at the West Street Detention Center?

A That's the only place I ever saw them, yes.

Q Who else was present there?

A At the third meeting?

Q At the third meeting.

A Just he and I, sir.

Q What was the substance of those discussions?

A He wanted to be thoroughly informed as to what Johnny was doing, how it was being done, what the reactions were. And he asked me to prepare a letter manifesting all of the conditions that John was presenting to the doctors there.

I ultimately gave such a letter to John. What

he did with it, I have no way of knowing, except that in a future conversation over the telephone with Mr. Hochheiser, he complimented me on its professionality.

THE COURT: Well, it's five o'clock, gentlemen.

Mr. Querques, have you heard enough to know whether you want to put on more witnesses after this witness?

MR. QUERQUES: I'm sure I'm going to have to. You can see the problems arising. There's a lot of names coming out. The only one that's familiar to me is Hochheiser.

MR. ROSEN: Your Honor, I will done with direct in five more minutes.

THE COURT: Finish your direct, and then I'll recess.

A The last time I spoke to Mr. Hochheiser was on a particular Sunday. John had just been taken to either Bellevue Hospital or St. Vincent's. I have reason to believe it was Bellevue, but it could have well been St. Vincent's because this lawyer, whatever his name was, was the MTA. That was one of the falls that he took.

Q Was that an accident?

A No, sir.

I called, as were my instructions. I went to the telephone and called Mr. Hochheiser. A woman answered the telephone. I asked for Mr. Hochheiser. She said, "Who's calling"?

I said, "This is Nathan Lemler."

She said, "Oh, Dr. Lemler, from West Street?"

I said, "Yes, ma'am. Could I please speak to him?"

She said, "I'll get him. He's out in the yard."

I waited a minute or tw , and then she came back and apologized. She said she just saw him pulling out of the driveway, would I call back in the afternoon.

I said from where I was I couldn't give her that assurance, but would she please tell him that Johnny was just taken to the hospital and it looked like it was working very well.

* * *

* * *

Center?

A Never saw him, heard from him or spoke to him again, sir.

Q Mr. Lemler, when did you first report what you are saying in court today to authorities?

A Immediately to the United States Attorney, Mr. Harris.

Q When did you report those activities to the office of the United States Attorney for the District of New Jersey?

A I was at Mr. Harris' desk one day when he called New Jersey, and I spoke for not more than a minute and a half to a Mr. Robertson.

* * *

* * *

Q Do you recall when you started in '67?

A Well, my business had been established before that, sir.

Q When did you start taking the money for this service, late '67?

A Probably, sir. Certainly no later than early 1968.

Q All right. So we are talking about a period of roughly four and a half years.

A Roughly four years, sir.

Q Four years. Okay. Do you know the total amount of money that you took in?

A Do you mean gross, sir?

Q No, sir.

A No, I would not have that figure available to me, because --

Q Not even a vague idea; half a million dollars?

A I would say it was in excess of that, sir.

Q A million dollars?

A Well, when you say "take in," sir --

Q Gross.

A You have to permit me to qualify the answer. I worked on a total refund basis. I have records to attest to that over this four-year period I refunded better than a half a million dollars.

* * *

* * *

Lauter - cross

A I would be more than happy, sir.

Q Let's go.

A This is the first opportunity I have ever had to do that.

Number one, I filed, upon my indictment -- or prior to my indictment, when I was the target of investigation, I filed a Waiver of Immunity with the District Attorney of Nassau County, pleading for an opportunity to appeal before that Grand Jury. They never permitted me to appear before a Grand Jury. I feel that is a violation of my Constitutional rights.

Number two --

Q If you don't mind --

A I'm sorry. I didn't realize you were recording this, sir.

Q This particular point that you have just made, is it a point that you thought of, or is it a point the idea for which was given to you by a lawyer?

A The idea for which was given to me by a series of lawyers.

Q Okay. Now, the second one, sir.

A The second one -- and to me -- of course, I am not educated -- the most important one, is the fact that all of the material that I believe would be fully exculpatory was withheld from me, and not made available to me at any

* * *

A I told him about the nature of an assignment I was working on.

Q An assignment for what?

A For the United States Government.

Q You mean as of September 1973 you had an assignment from the Government?

A Yes, sir.

Q Do I take it correct, that the assignment had something to do with your being some kind of an informer?

A Yes, sir.

Q When was it that you first undertook what you call the "assignment"?

A Oh about -- certainly not more than a week or ten days, possibly less after my release on bail.

Q When was that, sir?

A I was released on the 18th of June, 1973.

Q And you say it was within a week after that.

A Not more than that, sir.

Q So it was then definitely within the month of June 1973 that you undertook the "assignment"?

A Well, sir, if I have to go on the record I would have to say that is as close as I can make it.

Q [illegible]. I am not quibbling about dates. I am just trying to pin it down.

A Yes. Certainly by early July, sir, this program

effect.

Q You can cover yourself by saying on or about approximately. It is okay with me.

A Yes.

Q I don't want to know what the assignment is. I don't think I'm going to get into anything confidential, but I do want you to tell me from whom you undertook the assignment, what particular agency of the Government was it.

A I think, sir, they are known as the Federal Drug Agency.

Q The FDA?

A Sir, as I understand it, that was a title that was given to them very soon after I began the operation. They were known by some other initials prior to that.

THE COURT: I think you are right.

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Q Now, how did this assignment come about, because you sent for some representative of the government?

A No, sir. While I was in prison I had sent for representatives of the Federal Bureau of Investigation on many, many, many instances.

Q Now, you have used the word "many" four times.

A Yes.

Q What should I take it to mean?

A At least ten letters, sir.

Q Ten?

A Yes, sir.

Q Not a hundred?

A Oh, no.

Q Ten. You wrote ten letters.

A At least that, sir.

Q To the FBI?

A Yes, sir.

Q In New York City?

A No, sir; Nassau County.

Q You had an address for the local office of the FBI in Nassau?

A Sir, as I recall it, I just put "Federal Bureau of Investigation, Mineola, Nassau County, New York."

Q Go ahead, continue. I'm sorry.

A On one instance, after many of these letters, on one instance I was visited just before Christmas --

Q That would now be '72?

A Yes, sir. I was visited just before Christmas by an agent of the Federal Bureau of Investigation.

Q Name, please?

A I could not remember that, if my life depended on it, except that he told me that he was then very, very newly assigned to the Bureau. He was a man about sixty-three or four --

Q I am not interested in that.

A I could not remember his name, sir.

Q The point you are now making is that you wrote to the FBI ten times, and when they finally did respond they sent some recruit out, who told you that he was very, very newly assigned. And I take it that the end result is that nothing was done between you and the FBI, is that right?

A Precisely.

Q Now, having struck out -- if I may use that expression -- with the FBI, when did you next contact?

A I don't believe, sir, that I contacted any other agency until my release, where I personally went to the drug

* * *

* * *



A Yes, sir. Their names would not now -- they would be familiar to me if I could recall them, but I couldn't off the top of my head.

Q Did someone direct you to write letters to the FBI?

A No, sir.

Q Or was that your idea?

A My idea, sir.

Q And your idea in writing these letters to the FBI was, I take it, to help them so that they would help you?

A No, sir.

My idea was to help me, sir, so that I could help me. I couldn't care less about helping them, sir.

Q You wanted help from them?

A Yes, sir.

Q Now, the FBI was a federal agency and here you were involved in a state case, is that correct?

A That is not correct, sir.

Q Well, your charges were in the state court?

A But they shouldn't have been. That is precisely the point.

Q All right. That is your judgment. Now, tell me [illegible] that went through your mind, what did you say to yourself that precipitated or caused you to send for

* * *

Q That's what you thought it was?

A Yes, sir.

Q This business of grand larceny by false promises, that was a new concept which, I gather, until today, as a matter of fact, probably has never really been digested by you?

A I gather from what has happened, it hasn't been digested by many others, including members of my jury.

Q I don't know what that means, but I don't want to get into that. We would be here another day with just that.

I take it you must have had the jury checked, or something.

But, okay. You were looking for help from the FBI because you say you committed the crime of bribery and not false promises; wherein would you have thought on those occasions, when you wrote those ten letters, or more, that the bribery, which you now say you did committ, in fact, was Federal bribery, or bribery cognizable under the Federal law?

A Because it was the bribery of a Federal official, sir.

Q Is that the reason by, in your mind, you confused up the notion that it was Federal?

A Surely.

Q I see. You could not conceive at that time that the bribery would be a state offense, as well, because --

A I knew that, sir.

Q -- because it was the State of New York?

A I knew that, sir. But the briberies committed in terms of the State bribery, sir, were not committed in New York State. So I felt there would be no jurisdiction.

Q Where was the bribery committed?

A All over the country except New York State, Chicago, Tennessee, Louisville, California.

Q Is it your certification now --

MR. ROBERTSON: Your Honor, excuse me. I don't mean to interrupt, your Honor, but I would ask that we not get into the details of certain matters that Mr. Lemler may have knowledge of, and I represent to the Court there are certain continuing matters. So I don't want to inhibit Mr. Querques' cross-examination, but I am sure that there is some way that he can get around the area that he is trying to get around.

MR. QUERQUES: I am not pinning him down to anything.

MR. ROBERTSON: I don't want to get substantive information at this point because there is an investigative reason for it.

THE COURT: I know your purpose for doing this, Mr. Querques. I don't think that you have to bring out dates, places, names, and so forth.

MR. QUERQUES: I am not. I haven't.

MR. ROBERTSON: I am not objecting at all to the way that Mr. Querques is questioning.

Q So you say now that you committed bribery all

over the country?

A Yes.

Q All but in New York?

A Yes, sir.

Q You did that personally, I take it?

A I don't know what you mean, sir.

Q Well, I mean you were the one who made the bribe? You didn't send someone to do it?

A I had employees but I am solely responsible for that, sir.

THE COURT: You said the other day, if I understood you correctly, that the bribes were in connection with draft exemptions, draft deferment, things of that nature.

THE WITNESS: And medical school and dental school acceptances.

THE COURT: All right.

Q These bribes, then, were around the country?

A Yes, sir.

Q And were to different people highly placed in medical school facilities?

MR. ROBERTSON: Your Honor, I object.

Q Without names.

MR. ROBERTSON: I object to going into this whole area. I know the point Mr. [illegible] is trying to

make. I think it has been well made for your Honor, the Court. I object to even going into the substantive general discussion of what Mr. Lemler is prepared or has told or is continuing to tell the FBI or the Federal Government pursuant to legitimate lawful investigations of criminal activities.

I represent to the Court that those activities and those investigations are continuing.

THE COURT: You wish to be heard?

MR. QUERQUES: No, your Honor.

THE COURT: You have made your point. I know what the next point you are going to make is.

MR. QUERQUES: I always enjoy how people can read my own mind and I don't know myself where I am going next.

THE COURT: I know where you were going.

MR. ROBERTSON: For the record, I doubt that.

THE COURT: I know it is not so. I don't know whether you want to ask it or not.

Q Mr. Lemler, did there ever come a time when the assignment or assignments that you had from DEA resulted in your being a witness?

A No, sir.

Q How much money did you receive from the DEA

* * *

A Worse than that. I even gave him a bad check for five hundred dollars.

Q You mean he did ask you for some money and you gave him a bad check?

A Yes, sir.

THE COURT: Was it good for anything at all?

THE WITNESS: It was post-dated, money that I anticipated and which didn't come forth.

Q After the check bounced, he nonetheless continued to represent you?

A He certainly did.

Q This is because you continued to employ him?

A That's not the word, sir.

Q You didn't ask him to represent you? All right.

Did he know about you going to the DEA as well as the FBI?

A Yes, sir.

Q When you mentioned that you were supposed to get a postponement in September 1973, you did mention that, did you not?

A Not alone that, sir. I recall very clearly Mr. Shallot speaking to Mr. Greenberg over the telephone from Mr. Shallot's office.

Q Was it Mr. Shallot who had indicated to you you were going to get this postponement?

* * *

hundreds of young men out of the Army?

A Back in early 1968 or late '67.

Q It is obvious, is it not, that in '68 you didn't tell any authorities what you were doing?

Youdidn't do it in '69, '70 or '71, did you?

A I certainly did not.

Q You get arrested in late '71. Your records get confiscated in late '71, don't they?

A Uh huh.

Q You didn't go to anybody, did you, to tell the story that you are now telling to Mr. Harris in 1974?

A That's right, sir.

Q And you didn't tell it to anyone in '73, did you?

A Yes, I told it to somebody in 1973.

Q Who did you tell the story to in 1973?

A Mr. Shallot and his entire staff.

Q They are Drug Enforcement people, aren't they?

A Yes.

Q What did they say when you told them, "We don't want to hear it"?

A No, sir; they were very much interested in hearing it.

Q They were interested.

A Yes

Q Where did they send you with it, back home?

A No, sir; they sent me to a Mr. Noftollis, who was then an Assistant United States Attorney for the Eastern District. They also sent me -- or I shouldn't say that, they brought in members of what were identified to me as the CID of the United States Army.

Q When did yo meet Noftollis, in the Eastern District of New York?

A Just about -- not more than two weeks before I met Mr. Harris.

Q Tell me when it is, sir.

A I don't remember, but I know --

Q It has got to be late 1973, doesn't it?

A Yes, sir.

Q What is his first name?

A I just know him as Mr. Noftollis.

Q When did you meet the agents from the CID?

A Just about the same time. I cannot be specific about the date.

Q I should understand, when you use the expression CID, you mean Criminal Investigation -- I gather Department or Division -- of the United States Army?

A I believe it is Detachment.

Q That is what it is, an Army outfit?

A Yes.

Q You told them the whole story?

A I certainly did.

Q And this was just prior to your going on trial, wasn't it?

A Yes, sir.

Q And you proceeded to trial, didn't you?

A Yes, sir.

Q And this business of going to these people and telling this story of what happened, was an effort on your part to prevent yourself from going to trial, wasn't it?

A No, sir.

Q You wanted another postponement, didn't you?

A No, sir; that is not true.

Q You didn't want to avoid that trial?

A Yes, I wanted to avoid that trial.

Q How did you want to avoid it?

A Because I was told --

Q No, how did you want to avoid it?

A By any way I could.

Q Yes. Including giving information which up to that point you acknowledge you withheld?

A If you want to put it that way. But I only learned at that date, sir, that very date, from Mr. Greenberg, that I would not be permitted, nor would the trial permit any discussion of selective service. It was then that I realized that I could not conceivably get a fair trial.

Q Mr. Lemler, when you were in jail in 1962, did you learn something about becoming what some people call "jail wisened"?

A No, sir.

Q You learned nothing?

A Absolutely nothing, sir. I learned that it's a good place to stay out of.

Q A good place to stay out of, but you kept doing things to get yourself back in, didn't you?

A No, I am not so sure of that, sir.

Q Okay. When you went to Noftollis and the CID --

A I didn't go to the CID, sir, they came to me.

Q They came to you?

A Yes, sir.

Q When you had conversations with Noftollis and the CID, tell me what it is precisely that you told Noftollis

* * *

institutions. There seems to be some dispute how the two minimum sentences allegedly to run wild --

Q Can be aggregated?

A Yes.

Q Made consecutive to one another?

A Yes.

Q If it can be done it is four years eight months to fourteen years?

A Yes, sir.

Q You indicate that after that sentence you have been back to that same judge on motion seeking a new trial?

A The answer there is yes and no.

Q I don't know what that means, but I'll go on.

A Because I was brought there, sir, but I wasn't brought before the Court.

Q There was a motion argued?

A Error coram nobis.

Q You have some medical background other than in chiropracty?

A Yes.

Q What does it consist of?

A What some may consider a phony degree in biochemistry.

Q Well, you need to help me here. I know what phony means and I know what degree means, but I don't know

how you get it.

Tell me how you get a phony degree in biochemistry.

A Well, sir, there was a program back in 1952, I believe, where those who wished to enter this program could do a thesis, biochemical thesis. My deceased wife suggested to me that I look into this program because the study of biochemistry was a hobby of mine.

I looked into it and I did some work on it. Ultimately presented a thesis to the University of Rome and was rewarded --

Q University of what?

A University of Rome.

THE COURT: Rome, Italy?

THE WITNESS: Yes, sir.

Q This is how you got what you now call or admit is a phony degree in biochemistry?

A I didn't admit that, I said some would.

Q In 1953, I may have lost count, but you had not yet gone to the chiropracty --

A No, I had not.

Q And it was only shortly before that that you obtained your high school equivalency?

A That is true, sir.

Q I think that was '47, is that right?

A Yes, sir.

* * *

the ancillary promises or corollary promise referring to the Army, is that correct?

A That would depend on whether the candidate seeking my service was a college graduate. In other words, we had many who were seeking Selective Service deferment who were not eligible for medical school.

Q But you had a different contract for the Remedial School, and, as I understand it, that related only to the Army, as you tell it now?

A Yes, sir. Yes, sir.

Q Two different organizations, two different contracts?

A Yes, sir.

Q Now, when these people testified they said in substance that you took them?

A Yes, sir.

Q And you today are just as emphatic as any human being can be that you did not take them?

A Ever.

Q Is that so?

A Absolutely, sir.

Q Were you suffering from some mental deficiency in let's say from June of 1973 through April of 1974?

A No.

Q Were you off your rocker?

A No, sir.

Q Were you suffering from some ill health, some physical ill health that prevented you from thinking?

A No, sir.

Q You had all your faculities, didn't you?

A Absolutely, sir.

Q Physical and mental?

A Absolutely, sir.

Q And you were out of jail from June to January?

A Yes.

Q Ample time to write to the FDA?

A Yes.

Q And you had time to see the people at the FDA?

A Yes.

Q And you had time to get on the airplane with a ticket provided by the FDA?

A Yes, sir.

Q And to make your reports?

A Yes.

Q And deliver back your reports?

A Yes.

Q And there were at least twenty reports in number because that is how many times you saw Mr. Shalott?

A Yes.

Q All that time you spoke with those people? * * *

Q Within the first two weeks after you met DiGilio at West Street Jail, according to you, was he ever absent from that West Street Jail for more than hours at a time?

A Would you say that again?

Q Yes, sir.

From the first time that you met Mr. DiGilio for the two weeks thereafter, was he ever absent from the jail for more than hours at a time?

A I don't remember if it was in that close a period, but it could have been.

Q You're telling us then he was absent for more than hours at a time.

A There were times when he was absent, yes, sir, when he went to the hospital.

Q What is your recollection as to how long he was at the West Street Jail with you altogether, from when to when?

A I don't remember when he came in, sir, other than to say that it was late summer or early fall.

Q You don't remember when he came in but my question is how long was he there, a month, two months, three months or was it weeks, tell me.

A I would say, sir, not in excess of three months.

Q Can we take that to mean it is your recollection he was there --

A A couple of months.

Q Approximately three months?

A To the best of my recollection, sir.

Q During this approximately three months period, on how many occasions was he gone for more than a day at a time, I mean a whole day?

A That may have happened only once, sir, that I know of.

Q And onthat one time that you say he was out of there for more than a day, how long was he out of West Street?

A I don't recall him being out more than overnight, sir.

Q And that was one time?

A Yes.

Q Okay. So one time over a period of three months or approximately three months to be fair to you, he is gone one time overnight.

A I think so, sir.

Q Mr. Hochheiser met you, you said, approximately three weeks after you first met Mr. DiGilio.

A That is as good a guess as I care to make.

Q Now, sir, it was unclear to me last week --

A I can't hear you.

Q It was unclear to me last week what you said about when it was that you first went to the authorities

and reported the conversations or activities between you and Mr. DiGilio, so I will ask youthat question and I want you to be as precise as you can. You were telling us that Mr. DiGilio and you met in what you previously said was early fall, which you say is September 1974.

A Or thereabouts.

Q Or thereabouts. And you say youhad a conversation with him about the ultimate activity that you and he are going to engage in within hours, certainly on the first day he is there. You made that plain.

A Yes.

Q How long after that did it take you to go to the authorities to reveal what you say you were doing?

A On the very first occasion I had to be in Mr. Harris' office in connection with the investigation he was conducting, and I just cannot place a time on it.

Q You mean you have no recollection of how long it was after you first met Mr. DiGilio after you say you first engaged in this scheme in which you were a moving partner, you have no recollection of how long after that you saw Harris?

A No, sir. I just do not remember.

Q No recollection at all?

THE COURT: You revealed this episode of Digilio to Harris while DiGilio was still at West Street?

MR. QUERQUES: That was going to be my next question.

Q Now inasmuch as you revealed this to Mr. Harris while DiGilio was still at West Street answer this question: how long had he remained at West Street after you made the first revelation to Mr. Harris?

A Possibly a month, sir, but again I just don't want to be held accountable.

Q Your best recollection.

A Yes, sir.

Q Is that he reamined there approximately a month after you first talked to Mr. Harris?

A Yes.

Q In any event, Mr. Harris will be able to tell us when it was you told him because he made a memorandum, didn't he, and he put a date on it?

A I don't know.

Q You did tell us he called someone.

A Yes, sir.

Q And he called that someone, whoever it was, the same day you told him in your presence?

A Yes.

Q You told us that?

A Yes.

Q And you are firm about that under oath?

* * *

Q And then who unlocked it for you?

A It was not locked at that time. It was unlocked when I got to it, sir.

Q Who unlocked it?

A I do not know.

Q You just don't want to give the party up, or --

A That's not true. I honestly don't know.

Q How do you know for a fact that it was unlocked, if you didn't see someone unlock it?

A This is a deduction I make from the fact that I had seen it locked so often.

Q But it is a deduction.

A Yes.

Q Now, you indicated you called Mr. Hochheiser, I think you told us last Friday, some eight or ten times, at his house, is that right?

A Yes, sir.

Q I think you said you remember distinctly because of the area code.

A Yes.

Q When you called him on these eight or ten occasions, that was in the period of time you knew him.

A Yes, sir.

Q [illegible] the time period of time between the first visit he made to you and the third?

A And subsequent to that.

Q All right. Now, you tell me what period of time we should understand you were calling him.

A Up until the time that Mr. DiGilio --

Q During what period of time were you calling Mr. Hochheiser?

A Up until the time that Mr. DiGilio left the institution.

Q It was clear, then, that once he left you never called Mr. Hochheiser.

A I think, sir, that I called one more time from the regular inmate telephone on the wall in the general population. I did not get him, but I got a secretary.

Q Please, I don't want you confused. I have been asking you about your calling him at home. Is there anything you want to change?

A No. I never called him at home, after Mr. DiGilio left the institution.

Q Please, I don't want you to change the subject now. I have some reason. You have indicated to us, have you not, that you called him at home, that you remember the area code, and you called him eight to ten times.

A Yes, sir.

Q Now, that number, eight to ten times that you called him, between the time you first met him, you say,

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until the time that Mr. DiGilio left the institution, whatever date that turned out to be.

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q Can you estimate for me what that period of time would be, would it be weeks or months that you are calling Mr. Hochheiser after you first meet him until the time DiGilio leaves?

A Weeks, sir.

Q It was your testimony, was it not, that when you called him at his home, it would be a toll call, and that you had to reverse the charges?

A Yes, sir.

Q That's what you did on each and every occasion?

A Yes, sir.

Q And there is no question in your mind but that you mean that when you reversed the charges, the party on the other end -- to wit, Hochheiser -- is paying for the call?

A Yes, sir.

THE COURT: Where did Hochheiser live?

THE WITNESS: Westchester County.

Q Did you give us the area code as being what?

A 914, sir.

Q As a matter of fact, you indicated that he had some telephones --

A Yes, sir.

Q -- at home.

A Yes, sir.

Q Now I want to go to his office. Okay?

A Yes, sir.

THE COURT: I want to know the precise period of time that you made these phone calls to Mr. Hochheiser, collect, to his home, what month, or months?

MR. QUERQUES: May I help, your Honor, in fairness to him? He has not said to us the month. But he has given us the facts by which we can deduce the month, because he has said that it occurred from one date to the date when DiGilio left.

THE COURT: I understand.

MR. QUERQUES: He has indicated that he doesn't know when DiGilio left. And I can't press him on it, because he said it over and over.

THE COURT: It had to be during the time period during DiGilio's arrival at West Street and --

THE WITNESS: I only know, sir, it has to be prior to Thanksgiving, because I was already out in the hospital areas by Thanksgiving.

THE COURT: So the maximum period of time it

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Q Mr. Lemler, after you saw Jeffrey Harris, the Assistant U. S. Attorney, and you told him what you indicated to us the other day you told him about your activities in the West Street Ja l --

A Yes, sir.

Q -- what was the very next meeting, or conference, or conversation that you had with anyone connected with the Federal Government relative to the same subject matter that you discussed with Mr. Harris?

A I think on that occasion Mr. Harris put in a telephone call to what I believe was the New Jersey office of the Attorney General's office. I sat while Mr. Harris spoke --

Q Mr. Lemler, I don't mean to interrupt you but I think everybody here wants to move along and some of this we have heard. You spoke to Harris.

A He called somebody.

Q You then next on the telephone spoke to a man who you understood to be Robinson, and we learned from Mr. Robertson that it was he who spoke to you on the phone.

A Yes, sir.

Q When after that is the next time that you had a conversation with anyone connected with the Federal Government relating to the subject matter that you were discussing?

A I believe it was last week, sir. The day -- either the same day I was brought in to this courtroom or the day before it, sir.

Q And who was the gentleman that you spoke to last week?

A This gentleman right here, sir, Mr. Rosen.

Q Mr. Joel Rosen, correct?

A Yes, sir.

Q I am going to repeat this, because I think it is important. If I understand you correctly, you have not had any discussion whatsoever with anyone connected with Federal law enforcement between the time that you spoke to Mr. Jeffrey Harris in person, and you spoke to Mr. Robertson on the telephone -- and you will recall that Mr. Robertson indicated to us that his notes indicated that that telephone call was on October 22, 1974 -- from that day until one day last week --

A No, that is not true, sir. I am making an error.

Q Okay. Now, back up. Okay?

A Yes, sir.

Q I am telling you that I accept Mr. Robertson's statement that the call from Harris to him, and this conversation with you was October 22, 1974.

A Yes, sir.

* * *

* * *



THE COURT: I understand.

MR. QUERQUES: The records demonstrate -- When I say "records" these are the ones that we asked to be produced, and they are the so-called "sign-in" records of lawyers who are visiting clients at the West Street Jail.

The first one I would like to note is one from R. B. Cherry, the same one I mentioned earlier. And the date is July 1st, which we have to take as being '74 though it is not indicated. But that is the year that he was there.

The next one is George Mettler. The date of that is 9-16-74. It indicates the time in as 3:30 p.m., and the time out as 4:00 p.m.

The next one is Lawrence Hochheiser. The date is October 11, 1974. It does not have the time -- I'm sorry. It has the time in as being 11:45. There is no time out.

The next one is Lawrence Cohen, who we understand to be Mr. Hochheiser's partner. The date is October 24, 1974. Time in, 2:45; time out, 3:00 p.m.

There is one in the name of Lawrence Hochheiser. The date is not on it, however. The time in is 3:30, and the time out is 4:00 o'clock.

There is one, your Honor, that I would like to ask the man about.

MR. ROBERTSON: Your Honor, I would stipulate * * *

* * *

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A Two or three minutes.

Any more details about your instructions to

in simulating cyncopal attacks or fainting spells?

A I remember discussing very carefully with him

somewhat commonly known manifestation of a petit mal

epilepsy

Q Did you fill him in on the details of simulating

a petit mal attack?

A Yes, sir.

Q What did you tell him to do?

A That during a normal conversation with whomever

he was speaking, to suddenly stop talking, to stare blankly

at the person he was talking to and after about a minute and

a half, possibly two minutes, to continue right on with his

conversation as if nothing had happened.

Q Did you witness his performances in this

endeavor?

A I did, sir.

Q How apt a pupil was he?

A I thought in that specific area he was excellen

Q How apt a pupil was he in the simulation of

fainting spells?

A I thought he overacted tremendously.

Q Now, any other symptomotologies of brain

disease which you aided in the instruction of Mr. DiGil

* * *

the man who was an investigator for the United States Attorney in New York.

Q I digress for a second, Mr. Lemler. When did you first tell Mr. Geoffrey Harris that you were assisting Mr. DiGilio in this scheme?

A The first time I got to see him after I commenced with the --

MR. QUERQUES: I don't understand that.

Q When did you tell Mr. Harris in relationship to the time that you started this scheme?

A The first time that I had occasion to be with Mr. Harris.

Q After what time?

A After I had begun working with John DiGilio.

Q And was that the same day that Mr. Harris called the United States Attorney's office?

A Yes, sir.

Q From that day until this day who have you spoken to other than Mr.Harris about this?

A Mr. Alessi, Mr. Rosen, and yourself.

Q Between that day and today -- rephrase the question.

Subsequent to the first time you told Mr. Harris when he made that telephone call, do you know what efforts, if any, were made to have you further interviewed? Do you

Q Was he alone?

A Yes, sir. I never saw Mr. Cohen again, sir.

Q How many more times did you see Mr. Hochheiser?

A Never again after that third visit, sir.

Q Now, Mr. Lemler, listen to me. When in relationship to the time you first saw Mr. Hochheiser did you start teaching Mr. DiGilio?

A Sir, I started working with John almost as soon as he came in. So it was several weeks before I had seen Mr. Hochheiser for the first time.

Q Okay. When in relationship to the time you were teaching Mr. DiGilio did you tell Mr. Harris about teaching Mr. DiGilio?

A Possibly as much as -- Would you repeat that question again?

(Question read.)

MR. QUERQUES: Your Honor, I thought --

A Possibly as much as a month.

MR. QUERQUES: I thought we had understood this as being October 22nd. That's the date that Mr. Robertson made on the notes on the telephone call.

MR. ROBERTSON: My question is now: When did you start teaching DiGilio; how much before that or after that?

THE COURT: He said about a month.

MR. ROBERTSON: All right.

Q Before or after?

A Before or after what, sir?

THE COURT: You started teaching DiGilio about a month before you told Harris about it; right?

THE WITNESS: Yes, sir.

THE COURT: Okay.

Q When you told Mr. Harris, was DiGilio still at West Street?

A Yes, sir.

Q How much longer did he stay at West Street?

A Oh, I don't remember that, sir.

Q Judge Meanor asked you a question with regard to the symptoms of organic brain disease and those you taught Mr. DiGilio. Okay?

A Yes, sir.

Q Did you teach Mr. DiGilio from your memory alone?

A No, sir.

Q I show you G-1. I think you said this was a more recent edition.

A Yes, sir.

MR. ROBERTSON: (To Mr. Querques) Do you have an older edition?

Q How old was the other edition you were working

* * *

* * *



Lemler - redirect

Q Now, after you told Mr. Harris about teaching Mr. DiGilio, did you thereafter continue to teach Mr. DiGilio?

A I think, sir, that it was practice rather than further teaching.

Q I'm going to cover one very broad area with one question. All right?

A Yes, sir.

Q One question: Mr. Querques asked you about a lot of prior involvements, crimes, convictions, testimony, people, proceedings -- and I think I have covered it generically. All right. He asked you all those things.

A Yes, sir.

Q Is there any area there that you did not answer to truthfully?

A To the best of my knowledge, no, sir.

Q Was there any statement or any subject matter that you did not feel you were given an opportunity to explain fully?

A Yes, sir.

Q All right. Can you briefly expand on those subject matters that you did not have an opportunity to explain fully in response to Mr. Querques' questions?

A Can I or will you?

Q Can you?

* * *

Q Mr. Lemler, you understand I have to ask the question.

A Yes.

Q Do you recall what was discussed during these half-dozen telephone calls?

A Only about John is going to win this case. He likes you very much and you have a good friend outside. He's crazy about you, that kind of thing.

Q Now did you talk to Mr. Hochheiser on the telephone after Mr. DiGilio left West Street?

A After Mr. DiGilio left West Street, no, sir, never.

Q Did you attempt to get in touch with Mr. Hochheiser?

A Yes, sir.

Q When was that?

A One time, sir, I believe -- my best guess is that it was during the month of March.

Q What year?

A This year, sir.

Q Why did you try and get in touch with him?

A Well, Mr. Marzano asked me to call him for a different reason.

Q What reason?

A Must I answer that?

* * *

Lemler - redirect

this?

A Yes, sir.

Q How did you know?

A I just can't describe that, sir. It was just that it was part of the plan.

Q Did he tell you he was going to do it?

A Not at that moment, sir.

Q Do you recall the substance of what he told you about the time he was going to go to Bellevue?

A No, sir, I don't recall?

Q You said you called Mr. Hochheiser on one occasion?

A I called him on more than one occasion.

Q On one occasion when Mr. DiGilio was going to the hospital?

A Yes, sir.

Q How did you know to call Mr. Hochheiser? Who told you to do that?

A He did.

Q Who told you?

A Di Gilio said don't forget if I go to the hospital you will call Larry.

Q Do you remember calling Mr. Hochheiser when Mr. DiGilio was going to the hospital?

A Yes, sir.

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Q And where did you call him, in his office of in his home?

A No, sir. It was a weekday night I called him at home.

Q And approximately what time of day?

A I would have to say around noon, sir.

Q Did you speak to him on the telephone?

A No, sir, I did not.

Q Did you pay for the call or was it a collect call?

A It was a collect call.

Q Who did you speak to on the phone?

A Lady who said she was Mrs. Hochheiser.

Q How did you identify yourself?

A As Nathan Lemler.

Q What did she say when you did that?

A "Oh, Dr. Lemler from West Street."

Q How did Mr. Hochheiser address you?

A I don't ever recall his addressing me by name, sir.

* * *

TRANSCRIPT OF HEARING BEFORE J. BRIEANT
DATED NOVEMBER 10, 1975

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA,

vs. 74 Cr. 928
75 Cr. 127

WILLIAM SANGEMINO,

Defendant.

- - - - - - - - - - - - - - - - - - - - - - x

November 10, 1975
4:30 p.m.

BEFORE:

HON. CHARLES L. BRIEANT, JR.,

District Judge.

APPEARANCES:

THOMAS J. CAHILL, ESQ.
United States Attorney
JEFFREY HARRIS, ESQ.
Assistant United States Attorney

MICHAEL B. POLLACK, ESQ.
Attorney for defendant.

THE CLERK: United States of America versus William Sangemino.

MR. HARRIS: The Government is ready.

MR. POLLACK: The defendant is ready.

THE COURT: All right, Mr. Pollack, you may be heard.

MR. POLLACK: Your Honor, the defendant, William Sangemino, has moved under Rule 33 and under the case of Brady versus Maryland for a new trial on the failure of the Government to disclose new evidence in its possession.

Just as a backdrop, your Honor, Major Sangemino was tried and convicted in the spring of 1975 based primarily on the testimony of Nathan Lemler.

In the fall of 1974, Nathan Lemler, while incarcerated in West Street, was giving advice by his own testimony to an incarcerated prisoner on how he could feign illness sufficiently so that his trial would be delayed or possibly never occur.

One of the aspects against Major Sangemino was that he was part of a scenario with Nathan Lemler to create such medical situations so as to cause deferments of young men who were otherwise eligible for entrance into the military service.

Your Honor, not only is that my memory of the

case but on page 4 of the Court's memorandum and order denying our earlier motion, the Court states that to be also the case. The defendant's argument at this point, your Honor, is two-pronged:

First, it is our argument that based upon the case of Brady versus Maryland and the cases which have followed it in the Second Circuit and elsewhere, that testimony, that evidence should have been brought forward to the defendant so he could use it in preparation of his case.

Now, the facts as we have developed them are as follows:

In a letter Mr. Harris sent pursuant to the Court's request, he stated that he first heard of this about September 19, 1974 and immediately had Lemler call New Jersey from his office.

Mr. Robertson stated in the transcript, which has been cited to the Court in our papers, that his notes indicate he received a call in October, I believe the date is the 22nd, of 1974. Mr. Robertson indicated quite clearly in that statement that there were notes, your Honor.

Now, it is our position, your Honor, that based upon Brady and the standard which we submit is set forth in the case of United States versus Seijo, 514 Federal Reporter, there is a significant chance that this added item developed

by skilled counsel could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.

This information, your Honor, in the hands of an attorney in New Jersey by the name of Michael Querkes was sufficiently used to convince Federal District Court Judge Robert Meanor that Nathan Lemler was not telling the truth and while Judge Meanor declared the defendant DeGiglio sufficiently competent to stand trial, he did explicitly state he was not basing his decision in any way upon the testimony of Nathan Lemler.

He further characterized the witness Lemler as a fox in a chicken coop and a prevaricator who has prevaricated everything in his life and is prevaricating this.

There are things in that testimony which are not in the transcript I have, but there is testimony Mr. Laurence Hochheiser was brought in to testify of that situation, your Honor, and Nathan Lemler who stated he called Hochheiser from the jail collect in a 914 area code, Hochheiser produced and he has represented the same to me his telephone bills for the period which showed no calls to his home collect or otherwise from Nathan Lemler.

Your Honor, I think that the cases are clear in Seijo, Rosner, in Allredge, which is cited in the

defendant's first memorandum to the Court or letter to the Court dated the 20th of August 1975, are such that the expression of evidence favorable to the accused or which can be used by the accused to mitigate sentence or to attack the credibility of the witness is imperative it be turned over.

Judge Frankel in the Deutsch decision makes it very clear that in his opinion this turnover cannot be done in a broad litany which the prosecution tends to use. We will make all Brady material known.

In fact, in this case, the exact words of the prosecutor were, "We have made liberal discovery of Brady material so as to avoid any problems."

Now, under any standard, whether we are talking about neglect or intentional, it is our position that the failure to turn this over denied the defendant Sargemino his constitutional rights to due process and I submit to the Court that the language in Seijo, and I would like to read three aspects of it from page 1364 --

THE COURT: I don't think you need to read it. I am particularly well familiar with it.

MR. POLLACK: The language of Seijo is abundantly clear that this is met.

Also, your Honor, as a secondary point and I

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think also as applicable, I submit to the Court that the decision in the Supreme Court of United States versus Mesarosh which is at I believe 352 United States 1 is characterized in the following way by the Second Circuit in United States versus Rosner:

"Mesarosh involved the situation where a key witness who had accused people of Communist affiliations had been conceded by the Government to have testified against others in a Senate investigation in such a bizzare fashion as to raise the inference that he was either an inveterate perjuror or a disordered mind."

Your Honor, I submit that that is particularly applicable to this case in the findings of Judge Meanor. In this case, your Honor, the defendant has consistently asked for any material within the possession of the Federal Bureau of Investigation or any other Federal agency regarding Nathan Lemler and/or his allegations. We have been consistently told they do not exist.

Nathan Lemler testified he wrote ten letters to the FBI and was in fact contacted by the FBI in jail. I submit, your Honor, that --

THE COURT: He testified to that in Jersey?

MR. POLLACK: Yes. It is cited, if the Court would like a citation of the page, if the Court will bear

with me, this is cited, your Honor, in my affidavit --

MR. HARRIS: Page 3, Mr. Pollack, of your affidavit.

MR. POLLACK: Page 3, and it is in the transcript of June 11th at pages 29 and 30.

THE COURT: That he wrote ten letters to the FBI?

MR. POLLACK: That's correct, your Honor, and that he was visited by an agent in, I believe it is Nassau County, your Honor, in 1972.

If the Court remembers, I brought forth a letter from Mr. Winkler who testified he received a call from an agent in 1972 requesting information about Lemler. (see Shea tape)

We have also, your Honor, made application to the United States Attorney under the Freedom of Information Act and to Mr. LaProd, the person in charge of the New York office of the FBI, and in each instance, we have been told that this information is not in existence.

Now, your Honor, either Nathan Lemler is lying or the prosecution has failed to meet its obligation to turn this material over. In either case, your Honor, I submit this is grounds for a retrial, whether under the failure to comply with Brady or the Mesarosh decision as interpreted by the case of United States versus Rosner.

Your Honor, I further show to the Court that

Lemler testified in New Jersey on June 11th, trial transcript page 11, that he had over 400 clients --

THE COURT: He told us that, too.

MR. POLLACK: The basis of these clients, your Honor, was a two-pronged arrangement. Either he would get them in medical school or if he did not, he would make sure they were not drafted. He testified he grossed over $1 million in the four and a half year period between 1967 and 1972.

He further testified, and I quote, your Honor:

"I have records to indicate that over this four-year period, I have refunded better than a half million dollars."

Your Honor, those records were never produced and if Nathan Lemler's testimony is to be taken as accurate in this courtroom, it means he gave a half million dollars back to the one client he was unable to secure effective service for.

I submit to the Court that Lemler's testimony there, we are either entitled to the records or we are entitled to an assent by the United States Attorney as in Mesarosh, that Lemler was lying when he said the U. S. Attorney had these documents and if he is lying, then the Court of Appeals in Rosner, where they called the witness an

inveterate perjuror or a disordered mind is totally applicable to this case and I believe we are bound by it.

In Mesarosh, the solicitor general brought this information forward, your Honor, he brought it forward and asked for a remand to the District Court for a determination and the Supreme Court answered in the negative stating that the trial transcript was so polluted that there is no way to cure the pollution but to drain the reservoir of water and retry the case, so it was remanded to the District Court for another trial.

Your Honor, Lemler testified that he dealt with DiGiglio to set up an aspect of petit mal epilepsy which was one of the things Lemler was going to teach to DiGiglio to feign in order to avoid coming to trial.

In his defense, in his own trial, Sangemino said there was conversation with Lemler about this and what the defendant Sangemino said, your Honor, in his defense was Lemler did come in, presented situations to me and I gave him my opinion as to when that, if proved, would warrant a deferment.

If, in fact, Nathan Lemler was capable of teaching the feigning of illness, especially the concept of petit mal epilepsy which is specifically mentioned by Major Sangemino in his testimony and specifically mentioned by

Lemler in his testimony regarding DiGiglio, then that information developed by highly skilled counsel would have been important to the defense of William Sangemino in his defense, especially when he brought it without knowledge of Lemler's activity in the fall of 1974.

Also, your Honor, if there are no notes, Mr. Robertson has made a misstatement in the record. Robertson and Mr. Harris have stated two different dates at which this instance took place. There must be something available from which both parties refreshed their recollection as to the date it occurred. Neither has been presented to the defense in this case.

Your Honor, the last thing is something where Lemler goes into a long colloquy with the Court regarding having never fixed a case in New York and while Mr. Harris' affidavit accurately depicts something that takes place a couple of pages before indicating that Lemler did indicate at that hearing he would try to fix Major Sangemino and was consistent with his testimony, the Court butted in, injected itself into the line of questioning, your Honor, with the following question which follows this whole line regarding never having fixed a case in New York:

"You said the other day, if I understand you correctly, that the bribes were in connection with the draft

exemptions, draft deferment, things of that nature.

"THE WITNESS: And medical school and dental school acceptances.

"THE COURT: All right.

"Q These bribes, then, were around the country?

"A Yes, sir."

Your Honor, it is our position in this particular instance that the defendant had a right to know of Lemler's activities, the extent of the Government's knowledge; he had a right to have time, especially as put forth by the Court of Appeals in the Allredge case, your Honor -- and if I may cite what the Court of Appeals said in that case, it said -- it is at 498 Federal Reporter 2d:

"Given the time for preparation which counsel was denied by the belated disclosure" -- and this is a disclosure, your Honor -- "it seems to me counsel might have pursued a course of inquiry which would have resulted in ferreting our the relevant Walsh information."

While, your Honor, I submit that the denial in this case of any disclosure denied us the ability to bring forth information which could be used to show the witness, Nathan Lemler, was a witness beyond credibility, and I submit to the Court that under all of the standards set forth,

whether by neglect or intentional, the prosecution has not met its standards, its accepted standards under Brady and under the concep' of Mesarosh, your Honor, in this particular case if Lemler's testimony is allowed to stand, it amounts to the testimony of pollution because he has contradicted it.

Records either exist or they don't exist. If they don't exist, he is a perjuror. If they do exist, we have a right to them and for those reasons.

Your Honor, I respectfully submit that the defendant Sangemino is entitled to and justice demands he be given a new trial with this information to put before a jury for an adequate determination of the situation.

I have cited many cases. I believe the Court knows all of them. I would ask the Court to look at Rosner in 516 Fed. 2d, Allredge, Seijo, which the Court obviously has familiarity with, Mesarosh at 352 U.S. 1, Judge Frankel's decision in United States versus Deutsch in 373 Fed. Sup. 289, and the case of United States versus Williams which is in the Ninth Circuit and it is in 500 Fed. 2d 505, in which the Court says a conviction based upon substantially tainted evidence cannot stand and that was a case in which a Government agent having testified corroboratively was subsequently indicted for obstruction of

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justice and perjury. There the Court said that indictment was sufficient to sufficiently taint the prior testimony in a different case as to require that a new trial be given --

THE COURT: That is not the law in this Circuit. That is a Ninth Circuit case.

MR. POLLACK: That is a Ninth Circuit case, yes.

THE COURT: I know about that case.

MR. POLLACK: I believe in the Rosner case, Your Honor, it follows the same rationale at page 279.

THE COURT: All right. Thank you.

Mr. Harris? First, what about these records? Are there records?

MR. HARRIS: Your Honor, to my knowledge there are records as to certain refunds made to client's in Lemler's Medical School Placement Service that the Government has that the Government chose not to introduce into this case, that have nothing to do with the case of United States versus William Sangemino.

Lemler also claims that there are other records, and if you recall his testimony, at trial he said that he gave them to his daughter, Harriet Tolin, and she said when she testified that she does not have them.

THE COURT: She said she never received them.

MR. HARRIS: If those are her words --

THE COURT: That is my memory. She said she never received them.

MR. HARRIS: I believe she said all she had from her father were some canceled checks from a personal account. Nothing from his business.

THE COURT: She said she never received the three-by-five cards.

MR. HARRIS: Correct. -- which he said he gave her, which had all the records of payments and refunds to his clients -- all payment information.

Second, your Honor, Mr. Pollack premised this, his argument to the Court, by stating that the conviction of William Sangemino was based primarily on the testimony of Nathan Lemler. As the Government pointed out in our response to Mr. Pollack's first argument, first motion, rather, and as your Honor wrote in your memorandum opinion, the Government does not concede that at all. We argue, quite to the contrary, that Sangemino was convicted here because Lemler's testimony was corroborated, and without going through the entire list of testimony which the Government did do in its first response papers, Charles Hofshowitz testified that he he hand-to-hand gave Major Sangemino no money, and then there is that tape which, when listened to --

THE COURT: I know all about the tape.

RGP



MR. HARRIS: I don't want to beat a dead horse. Your Honor has heard the case, and your Honor has the Government's response to the first motion, where we do try extensively to go through each point of corroboration, and while Lemler was the person who chronologically added the most to it, he was corroborated, and that is why Sangemino was convicted. It wasn't a case of uncorroborated testimony.

Second, just to clear up the record, a close reading of the New Jersey transcript will reveal that Mr. Robertson was asked in court at some point when he spoke to Lemler on the telephone, the date of which I placed to the best of my recollection as September 19th, and he said, "I think it's on October 22nd. I'll have to check."

Thereafter, through the trial, the defense counsel refers to the date of October 22nd. That's the last Mr. Robertson is ever heard on that issue, and that date is sort of adopted.

I can advise the Court that Robertson did call me during that time period to try -- he told me that he was trying to determine the exact date, and he did not have any notes, and could I help him. Based on my scanty calendar notes and the fact that I know when I took a trip to California, which was in the beginning of October, I placed the date on September 19th, which I still place that telephone

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call on.

Be that as it may, the Government concedes in its papers that Lemler on or about the 19th of September -- and I believe that to be the exact date -- came in and said that he had been asked by this fellow DiCiglio in West Street about feigning incompetency, and at that point what I did -- and this is again in my papers -- is call the District of New Jersey after determining DiCiglio was a New Jersey prisoner, and spoke to Robertson, put him on the phone with Lemler. He spoke to Lemler for perhaps three to five minutes, I would estimate, and said that he would get back to me if he needed anything further on it.

Thereafter, a meeting was finally set up, and he did see Lemler in New Jersey after this trial ended, and he places that about the first week in June, but in any event it is definitely after his trial ended.

Now, as to 3500 material, with regard to this statement that Lemler made to me, I made no such notes; no one working on Sangemino did. Robertson informs me likewise he made no notes, and the simple answer is, there are no notes.

Further, the Government would argue that this was not the subject matter of Lemler's direct testimony and probably is not a statement for 3500 purposes in the prosecu-

of U. S. v. Sancemino. That is sort of mooted by the fact there are no such notes or write-ups or statements. There are no statements under the definition of "statement" in Rule 3500.

Now, that leaves the focus where it probably ought to be, and that is, was there any obligation under Brady to inform defense counsel of the fact that Lemler had been solicited by DiGiglio and did speak to him with regard to DiGiglio feigning incompetency.

With regard to this, Mr. Pollack's argument and his papers give the impression or urge the argument that this in the hands of defense counsel would have been very useful, because it shows that Sangemino was not a necessary person in the conspiracy involving U. S. v. Sangemino, in that Sangemino would not be required because Lemler himself possessed the medical expertise with which to advise his client.

Well, there are two answers to this, your Honor. The first is that Lemler's medical expertise, for whatever that may be worth, was brought out on direct examination of Lemler and on cross-examination by Mr. Brettschneider, in that he stated that he had a chiropractic degree and also this biochemistry degree from the University of Rome.

In addition to that, the only thing Lemler said he did in order to advise DiGiglio in New Jersey was to read

some texts in West Street. So the simple knowledge of Lemler of the art or the science of medicine was well known.

But secondly and more importantly is that the Government did not contend that, and the proof did not show that Major Sangemino provided Lemler with any medical expertise. The Government contended, and the proof clearly showed that Nathan Lemler had medical advice from a number of psychiatrists and doctors whom he used on his cases and that Major Sangemino's role was to provide the expertise in the Selective Service regulations and for his contacts both in Selective Service and at the AFES, the Armed Forces Examining Station, and with the United States Army.

Very frankly, the medical expertise was not something which Major Sangemino contributed to this conspiracy, and it is clear that the Government never contended that. The Government never argued that, and the jury didn't convict because they felt that Major Sangemino was providing the medical expertise in this case. There is just no question about that. That was never a contention. I mean, it's just out in left field.

As to the overall impact of Lemler's testimony in New Jersey, Mr. Pollack does take an excerpt which is excerpte in Paragraph 7 of his affidavit. I suppose that this is in there to advance the proposition that Lemler testified

inconsistently in New Jersey. As the Government pointed out in its response, your Honor, reading the pages that immediately precede the excerpt that Mr. Pollack has chosen to take to put before the Court, the Court will see that Lemler is being questioned as to why he didn't go to local authorities with certain of his medical school information, and he is talking about the fact that a lot of it was Federal jurisdiction.

A fair reading of the entire transcript of Lemler's testimony in New Jersey -- and specifically there are examples which the Government's answering papers cite -- shows that Lemler's testimony, where it touched on the same subject matter that was involved in this prosecution, was consistent.

At the hearing on the 11th, on pages 102 and 137, he talks about the fact that he got Resnick out of the Army and that the medical school prices were higher than Selective Service prices. He indicates that -- he admits that he bribed Sangemino, and he was an unindicted co-conspirator on that case, on the June 13th transcript, pages 19 and 20.

All the Government cares to say, your Honor, is that it is hard to boil down that entire transcript, but a fair reading of the New Jersey transcripts, where it touches on the prosecution here, indicates Lemler's testimony is

consistent.

THE COURT: I think perhaps I should read the ent transcript. Is it on file? Has it been submitted?

MR.HARRIS: I believe your Honor has a copy of it. I think Mr. Pollack provided a copy to the Court.

MR. POLLACK: Your Honor, that is only a transcrip of Lemler's statements and of Judge Meanor's conclusions. I does not include the other testimony,which was produced to discredit Lemler, including Mr. Hochheiser. That I don't have.

MR. HARRIS: Your Honor, my point here is that Lem testimony if you would read the whole thing, you will see in large measure it does not have anything to do with this case, but where in fact it does touch on it, a fair reading of that says it is as consistent as any human can be, two months separating in different contexts. I have read it carefully, and that is the conclusion that the Government urges on your Honor.

THE COURT: I will have to look at it.

MR. POLLACK: Your Honor, may I make two points?

MR. HARRIS: I am not finished yet.

THE COURT: I don't think Mr. Harris is finished.

MR. POLLACK: I am sorry.

MR. HARRIS: As to the matter of Lemler's testimony

that he wrote ten letters to the FBI and was visited by the FBI shortly before Christmas of 1972, just so we put that statement in context I first met Lemler, and I was the first one who undertook this investigation which led to the indictment in United States versus Sanger, on January 11, 1974.

During the trial, at Mr. Brettschneider's request, I believe it was the Government that requested that the FBI check its indices for the name Nathan Lemler and anything relating to Nathan Lemler, at which time we had a side bar, if your Honor remembers, and the Government told your Honor what it had. We had asked the FBI to check its indices.

I take it that Mr. Pollack has even gone further via a Freedom of Information Act request, and if in fact these letters were written, they are no longer in the possession of the Government, or they are beyond the capability of the FBI to retrieve, because they say they do not have them.

I think Mr. Pollack's statement is a fair one, that they said that they know of no such letters.

THE COURT: He is asking us to infer that they were never written and that Lemler lied about a totally immaterial thing like how many letters he wrote to the FBI.

MR. HARRIS: I would ask your Honor to infer what happens in a bureaucracy the size of the United States Government when unsolicited letters may be written from time

to time, in which there is no case opened. I am just saying that in a totality of the evidence this is such -- I don't know -- you know, I wasn't there. I didn't write them. I don't know whether Lemler wrote them, and I don't know whether the FBI lost them, never got them, did have them and have them filed in Canton Ohio and they are incapable of retrieving such letters. I don't know. I will tell you we did check the indices under "Lemler" during the trial, and we did come up with certain documents which Mr. Brettschneider and I and your Honor at the side bar, you will recall, when it was brought up, contended with, specifically the fact that we provided him with the information in the teletype from the FBI's Rome office vis-a-vis Lemler's Ph. D. in biochemistry.

What I will say, your Honor, is, this is a motion of opportunity, if I might call it that. They have come across Lemler's testimony in New Jersey, and now they would like to cast Major Sangemino as the linchpin of the conspiracy for which he was convicted in regard to medical expertise, because this incident with DiGiglio involved Lemler discussing medical expertise with DiGiglio.

The Government would just like to say that the Government never contended and the proof never showed that Sangemino was in this for any reason other than his accessibility to the Army and Selective Service and his expertise

in these areas. Further Lemler's testimony in New Jersey was as consistent as any human being could be expected to be.

Thirdly, and most importantly, what distinguishes this case from cases like Rosner is that Lemler was corroborated by many, many other pieces of evidence, other live witnesses, an eye witness who handed this defendant money, that tape which your Honor now is so familiar with, as well as other -- I would just refer your Honor to my first response which lists it all.

THE COURT: Yes. You need not repeat that argument. I understand your position.

MR. HARRIS: A reading of the Rosner case shows that the facts there were quite different. In that case a man named Leuci admitted to four improper acts involving under a thousand dollars, when in reality he later admitted to years and years of corruption, involving hundreds of thousands of dollars.

That is not quite what we have presented here by this motion, your Honor.

The Government would respectfully request that the Court deny this motion in all respects.

MR. POLLACK: Very quickly, your Honor, in the

Court's very own denial of our initial motion, on page 4, the Court said in both instances Lemler testified with the advice of Major Sangemino, a close member of the soldier's family staged a fraudulent suicide attempt.

Your Honor, there was evidence in this trial, and the Court understood it, and I gleaned it from the transcript, that Sangemino was conferred with advised and gave advice regarding methodology of obtaining --

THE COURT: A phony suicide is hardly in the same class as advising somebody as to how they may pretend to have epilepsy.

MR. POLLACK: Your Honor, it is very different, but it also goes into the context of the relationship Lemler had to Sangemino.

I would also direct the Court to the first footnote regarding Resnick's testiony, where it says --

MR. HARRIS: Page, please?

MR. POLLACK: It's the first footnote, sir. where the Court said, "The contract provided that for the sum of $10,000 Lemler would place Resnick in an accredited medical school in the Continental United States. It shall further be the responsibility of Lemler to successfully handle and process all Selective Service problems connected with the candidate for the lifetime of the contract."

Your Honor, there was only one contract talked about. This was a dual-purpose contract. It is consistent with the half million dollars that Lemler testifies to in over four hundred cases in New Jersey. It is not consistent with his testimony here, your Honor, because here there is only one failure, which certainly can never be contended, the payment and refund of half a million dollars.

Your Honor, it is a very elementary question: did the defendant have a right to know prior to trial and as of Thanksgiving 1974 the Government had no legitimate purpose to further keep it from the defendant, because DiGiglio was out of West Street and could not harm Lemler at that time -- did the defendant have a right to know that Lemler was using his medical expertise in a way to teach someone to feign medical illness, which is consistent with the methodology he was using to help keep people out of the draft?

I submit to the Court we are dealing with the truthfulness of one witness, as in Seijo, and there is more corroboration in Seijo than there was here. The police were present; there were drugs found; there were surveillance reports; there was independent evidence of Seijo's being around the situation; there was a packet of heroin found under the seat of the car in which he was arrested, and what the Court said there was, there was an absolute right -- and

the only perjury, as the Court remembers, was he denied having a record, and the Court said that that was sufficient; they had a right to know it, and it should have been turned over.

Here, either the Court must say the defendant Sangemino had a right to know that Lemler was in fact counseling another in jail while a Government witness pending trial how to feign illness to defeat the judicial system.

THE COURT: When did he begin to counsel DiGiglio?

MR. POLLACK: In the fall, September or October 1974.

THE COURT: When did he report it to the United States Attorney?

MR. POLLACK: Mr. Harris says September 19, 1974. Mr. Robertson indicates in the transcript it was October 22, 1974. Either way, your Honor, it was in the fall of that year. It was immediately taken under advisement, and it was sufficiently important to this office to immediately refer it to the office in New Jersey for their consideration and action as they saw fit.

I submit to your Honor that under Seijo and under Mesarosh also and all the cases --

THE COURT: Is this to be regarded as criminal conduct by Lemler if he is advising this man and

at the same time report what he is doing to the United States Attorney?

MR. POLLACK: He only reported it once, and no action was taken. No monitor was taken by any agency of the Federal Government to see what Lemler was doing.

In fact, had there not been a call from the U. S. Attorney in Newark in June of 1975, it is possible Lemler's conduct would never have been brought to light.

THE COURT: I don't quite follow that. As I understand it, he told Mr. Harris in September.

MR. POLLACK: And that is the last time Mr. Harris says there was any conversation about it. None of Lemler's conduct between September and Thanksgiving of 1974 was monitored by any Federal agency, although it was known by Mr. Harris and the United States Attorney's office.

THE COURT: I don't understand the implied criticism. As I visualize it, he told the U. S. Attorney that he was doing this, and they apparently said, "Oh, really?" And they called up the New Jersey attorney and told him about it.

What were they required to do more than that?

MR. POLLACK: They were required to inform the defendant, Sangemino, of Lemler's involvement.

THE COURT: Why? Because it was criminal conduct?

MR. POLLACK: No, because Lemler was showing a criminal expertise in a way that could defeat the --

THE COURT: Is that exculpatory?

MR. POLLACK: Yes; it is, under Rosner and Seijo, and I also point the Court's attention to Allredge, where the Court talks about the right to have knowledge, but it was not criminal not to turn over information of the perjury.

THE COURT: No. You see, perjury is a crime -- no question about that -- but clearly if a man informs the United States Attorney that he has been asked by DiGiglio to counsel him about how to fake his illness and is doing so, whether that is criminal conduct any more or whether that doesn't make Lemler a volunteer undercover agent --

MR. POLLACK: Your Honor, I would submit it does not, because the office was not monitoring his conduct.

THE COURT: I don't think they have to monitor his conduct.

MR. POLLACK: They have to know what he was doing. In any undercover situation there is a contact man where the agent can ascertain what are the bounds of his propriety and the bounds of his limitation. If he does not, your Honor, you have a runaway informant, who can say and do anything.

THE COURT: We are not trying DiGiglio here, are

we?

MR. POLLACK: No, but even under the DiGiglio rationale, if Lemler lied at that hearing -- and I point out to the Court that in the Mesarosh decision the lies were in a totally different scheme of things in the testimony of the trial. It had nothing to do with the testimony at trial.

But what the Court in Rosner -- it has nothing to do with the decision in Rosner, your Honor. It is just a characterization of the Mesarosh decision, where it says if it shows a witness to be either an inveterate perjurer or a disordered mind. Now, in this case you have a man who is a Government witness. He goes into court and testifies in a manner which is directly rebutted by the defense and of which the Court specifically makes a notation that it did not believe the witness.

Then, your Honor, I submit -- and the testimony at that hearing is contradictory to here, because I don't have any records showing a half million dollars. Mr. Harris should turn those over. I would like to see the refunds of a half million dollars of Nathan Lemler. I would like to see the three-by-five cards.

THE COURT: The three-by-five cards the witness said he gave to Mrs. Toland, and she said she never received them, and the jury knew all about that.

MR. POLLACK: I submit they went the way of the records that show a half million dollars, and I submit the number of cases Lemler testifies to in Newark is directly inconsistent to what he testifies here. Those are the citations.

I think it is a double-edged sword. I think we have a right to it under Brady, and it should have been turned over. I believe under Mesarosh, Lemler is an inveterate perjuror or a sick mind, and the jury should have a right to know what Lemler testified in both situations.

THE COURT: All right. If there is nothing further, gentlemen, I will mark it fully submitted.

Decision is reserved. Defendant is continued in his existing status.

MR. HARRIS: Would your Honor care to set a tentative date for us to check back with you or just want to hear from chambers?

THE COURT: I think I would prefer to just inform you.

Thank you, gentlemen. Good afternoon.

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# MEMORANDUM AND ORDER OF J. BRIEANT DENYING MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

-v-

WILLIAM SANGEMINO,

Defendant.

74 Cr. 928-CLB

MEMORANDUM AND ORDER

- - - - - - - - - - - - - - - - - - - - -X

Brieant, J.

Defendant moves, pursuant to Rule 33, F.R.Crim.P., for an order granting him a new trial on the grounds of (1) newly discovered evidence; (2) that the Government failed to meet its obligations of disclosure under 18 U.S.C. §3500 and Brady v. Maryland, 387 U.S. 83 (1963), and; (3) that his conviction rests upon the "tainted testimony" of a perjurer.

Familiarity with our first post-trial memorandum and order dated September 25, 1975 is assumed, ____ F.Supp. _____. Major Sangemino was found guilty on the three counts in these indictments which charged, in essence, that he, together with Nathan Lemler and others, conspired to defraud the United States by fraudulently obtaining Selective Service deferments and

compassionate discharges and reassignments for members of the armed forces; that Sangemino as a public official of the United States accepted a bribe; and that he made a material false statement under oath to the grand jury.

In our aforementioned Memorandum and Order, the Court recounted much of the proof that was adduced at the trial. In the interest of brevity, we will forego an elaborate repetition of that discussion of the trial, however, some discussion of the testimony of Nathan Lemler seems necessary.

Nathan Lemler, an unindicted co-conspirator, testified that he had been retained by young men or their parents in 401 cases to provide assistance in obtaining Selective Service deferments or compassionate discharges or reassignments from the armed forces. The case against Major Sangemino was presented through a description of Lemler's operations with emphasis upon five of Lemler's cases.

Lemler was the only witness to provide a chronological account of the events underlying the charges in these indictments. In our prior Memorandum and Order, after describing the Government's case against Sangemino, we observed that:

> "In sum, the Government's case against Major Sangemino was very strong, if the triers of fact viewed Lemler as a credible witness or considered that they had received substantial evidence to corroborate his relevant testimony." [p. 6, Emphasis added.]

Lemler's testimony was corroborated in several significant ways. The Government introduced the note that the defendant had written on the reverse side of his business card and which, through the intermediation of Lemler, was presented by Edward Resnick at his pre-induction physical examination at Fort Hamilton. Other documentary evidence included telephone messages from Sangemino relating to the draft and military problems of Lemler's clients.

On the quintessential point of whether Sangemino had accepted a bribe, Lemler's testimony was well corroborated. The Government introduced a tape of a conversation between Lemler and Sangemino in which Sangemino voices fear and concern about disclosures to the grand jury of payments to Sangemino in connection with Lemler's Selective Service activities. Lemler's allegations of bribery were also borne out in the testimony of Charles Mofschowitz. Mofschowitz testified that, on two occasions, he

delivered envelopes to Sangemino for Lemler and, on one occasion, he knew that the envelope contained $300.00 in currency. Other witnesses provided circumstantial evidence from which the jury might have inferred that Lemler made other payments to Sangemino.

The jury readily perceived the importance of the issue of Lemler's credibility and the value of the corroborating evidence. The jury requested to have the taped conversation and Mofschowtiz's testimony repeated for them, and to examine the exhibits relating to Lemler's telephone messages. On April 18, 1975, the jury returned guilty verdicts on all three counts in these indictments.

On June 6, 11 and 13, 1975, Lemler testified as a Government witness at a hearing in United States v. DiGilio, et al., Crim. No. 74-314, then pending in the District of New Jersey. In his testimony there, Lemler revealed that in the Fall of 1974, while a state prisoner in federal custody at Federal Detention Headquarters at West Street, he counseled John DiGilio, a federal detainee, on how to feign brain and nervous disorders in order to avoid his trial on criminal charges. Lemler testified that he informed the Assistant United States Attorney in this District

to whom these indictments were assigned that he was involved with DiGilio in this charade. The Assistant United States Attorney telephoned the Office of the United States Attorney for the District of New Jersey and informed the prosecutor responsible for the case against DiGilio of these developments. During that telephone conversation, Lemler spoke with that Assistant United States Attorney from New Jersey. Lemler testified that after disclosing his involvement with DiGilio as "jailhouse doctor" and informing the prosecutors of their illicit objective, he continued to coach DiGilio in his simulation of symptoms.

Defendant contends that the Government failed to comply with 18 U.S.C. §3500 by not divulging notes relating to Lemler's conversations with either of the two Assistant United States Attorneys. The Assistant United States Attorney for this District represented to the Court that he did not make notes of this conversation with Lemler on that occasion and that the New Jersey prosecutor had informed him that he made no notes of any conversation with Lemler until after the verdict in this case was returned. Upon these representations, the Court finds that, at the time of Lemler's cross-examination in this case, there were no statements

cognizable under 18 U.S.C. §3500(e)(1), for the Government to produce. The Jencks Act imposes no obligation on the United States Attorney to make and retain notes of their interviews. See United States v. Terrell, 474 F.2d 872, 875 (2d Cir. 1975).

Defendant contends that the Government breached its obligations under Brady in its failure to disclose Lemler's involvement with DiGilio in this seemingly fraudulent attempt to avoid prosecution. Defendant contends that this information was exculpatory of Sangemino in that Lemler demonstrated his own familiarity with medical symptoms and showed his willingness to apply that knowledge to a fraudulent end. More specifically, Lemler testified that among the symptoms which he instructed DiGilio in simulating were those associated with petit mal epilepsy. Defendant now contends that this information was material to the defense of his case. One of emler's clients, through which the Government attempted to demonstrate Sangemino's membership and role in the conspiracy was one Richard Falcoff, a Selective Service registrant whose induction had been delayed on medical grounds because of a history of petit mal epilepsy, and who was ultimately never inducted. Defendant contends that armed with

the knowledge that Lemler had coached DiGilio in feigning petit mal epilepsy, skilled defense counsel might have demonstrated that Lemler alone, or at least without assistance from Major Sangemino, could have coached Falcoff and fraudulently obtained the medical deferment.

The Government's theory at trial was not that Sangemino had provided medical expertise. In two cases involving members of the armed forces, Lemler testified that, after conferring with Sangemino, he arranged for a member of the soldier's family to stage a fraudulent suicide attempt and, thereafter, to be confined at South Oaks [psychiatric] Hospital. In this scheme, Lemler had the professional assistance of Dr. Teitelbaum, a psychiatrist who was named as a co-conspirator. Lemler had a continuing relationship with Dr. Teitelbaum for psychiatric services to be provided upon Lemler's referral. (Trial Tr. p. 379). Likewise, in the Falcoff case, although Lemler testified that he discussed Falcoff's draft predicament with Sangemino, he arranged with a Dr. Wesolowski to find some medical defect that would entitle Falcoff to a medical deferment.

Lemler's draft and military activities were far too sophisticated and professional to entrust "medical" counselling

to an unskilled person. In describing the efforts that were made to obtain a deferment for Edward Resnick, Lemler described the team of experts that he had massed:

> "Major Sangemino was the military man, [attorney] Jerry Friedland [also referred to as Friedlander in the trial transcript] arranged the necessary legal documents that were required or requested, and there were several physicians, and doctors that did other little things." (Trial Tr. pp. 448-49).

In obtaining a deferment for Resnick because of his enrollment in medical school, Sangemino's role "was to see that [Resnick] wasn't inducted while [medical school] applications were still alive, and [Sangemino] did that quite often with many people." (Trial Tr. p. 439). Plainly, it was never the Government's contention that Sangemino had provided medical counselling for Falcoff or any of Lemler's other clients. Consequently, that Lemler knew how to simulate brain and nervous disorders was not exculpatory of Sangemino in the least.

Furthermore, Lemler's knowledge of chiropractic, and its medical overtones, was known to defense counsel at Sangemino's trial. On cross-examination, defense counsel elicited an admission from Lemler that he knew how to "phony up an x-ray," and had done

so at an unspecified time. (Trial Tr. p. 418). It was evident to all, including the jury, that Lemler was unscrupulous enough to apply his medical knowledge to fraudulent ends.

Upon oral argument of this motion, defense counsel did not contend that this information was Brady material because it involved criminal conduct by a Government witness; nor did he contend that Lemler had been assured that he would not be prosecuted for his participation with DiGilio in this fraud.

To qualify as Brady material, the evidence must be of a favorable character for the defense and must also be material. Moore v. Illinois, 408 U.S. 786, 794-95 (1972). "The term 'materiality' as used in Brady clearly describes evidence of greater value than that which is merely 'favorable to the accused.'" United States v. Pfingst, 490 F.2d 262, 277 (2d Cir. 1973), cert. denied, 417 U.S. 919 (1974).

As in United States v. Rosner, 516 F.2d 269 (2d Cir. 1975), cert. filed, 44 U.S.L.W. 3207 (U.S.S.C. October 29, 1975), the issue here

> "is whether additional evidence tending further to impeach the credibility of a witness whose character has already been shown to be questionable, admissible

> only in the court's discretion, might have induced a reasonable juror who had no reasonable doubt of [defendant's] guilt, to have such doubt." Id., at 273-74 (emphasis in original).

Lemler testified extensively on direct and on cross-examination and admitted his prior criminal convictions including his convictions on twenty counts of grand larceny second degree, his not infrequent false representations, his present incarceration, and his interest in securing the favor of federal authorities to gain their assistance in avoiding having to serve a lengthy sentence for his state convictions. The Court was exceedingly free in the scope of the cross-examination which was permitted for impeachment purposes. Such cross-examination elicited Lemler's admission to a bigamous marriage, and to several instances of bribery wholly unrelated to this indictment, criminal acts which had not resulted in criminal convictions. See Rules 608(b), 609, F.R.Evid. When Lemler testified, Sangemino "was not confronted by a witness of assumed moral rectitude whose collapse from virtue might destroy the foundation of the prosecution case." United States v. Rosner, supra, at 275. Thus, evidence of another instance of Lemler's chicanery would have been "of minimal if any value in view of the ammunition already available to assault" Lemler's already suspect

credibility. United States v. Pfingst, supra, at 276.

In United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975), the prosecutor inadvertently failed to disclose a prior criminal conviction of the Government's major witness. The witness denied having any prior convictions and the Court of Appeals believed that a new trial was required since there was a significant chance that this additional information might have avoided the guilty verdict. The Seijo case is readily distinguishable from the circumstances presented here. In both cases, a co-conspirator testified to the involvement of the defendant in the criminal acts charged in the indictment. In Seijo, the Court viewed the evidence regarding the involvement of the defendants as depending essentially upon the uncorroborated testimony of Torres, a cooperating co-defendant. Here, additional evidence corroborated every significant aspect of Lemler's account and independently established Sangemino's participation. Lemler, unlike Torres, admitted his participation in a variety of criminal acts and made no profession to being a generally trustworthy person.

Finally, it is not claimed, nor could it be, that the information withheld demonstrates of its own force that Lemler

lied and that the conviction may rest upon perjured testimony. Cf. United States ex rel. Washington v. Vincent, ____F.2d____, Dkt. No. 75-2100 (2d Cir., Nov. 5, 1975). See generally United States v. Rosner, supra, at 283, n.8.

In sum, the Court finds that information regarding Lemler's scheme with DiGilio would not be exculpatory of Sangemino. Its value for the impeachment of Lemler would have been no more than merely cumulative, and it would have been discretionary with the Court wh ther to admit it even for the limited purpose of impeachment. Rule 608(b), F.R.Evid.

Approaching the problem raised by this non-disclosure from a different perspective, the Court finds that the Government's failure to disclose was not "a considered decision for the sake of obstruction," nor was this evidence of such value to the accused that its significance could not have escaped the prosecutor. United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969). Since this non-disclosure was not deliberate, "a new trial is required only if there is a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid

a conviction." United States v. Rosner, supra, at 272. See also United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969) and cases cited in United States v. Seijo, supra, at 1364, n.9. The Court is not persuaded that there exists a significant chance that this information would succeed in undermining Lemler's credibility where the entire previous assault on Lemler's character and integrity had failed to impress the jury when considered with the other evidence in the case. United States v. Morell, ____F.2d____, Dkt. Nos. 74-1827, 75-1200, at 5880-81 (2d Cir. Aug. 29, 1975) (slip opinion).

Defendant next contends that either material in the form of Lemler's business records was withheld from the defendant at his trial, or that Lemler lied during the hearing in the DiGilio case. On June 11, 1975 Lemler testified that he received approximately one million dollars in gross fees in connection with his medical school placement/military deferment business. Lemler then testified:

> "I worked on a total refund basis. I have records to indicate that over this four-year period I refunded better than half a million dollars." [DiGilio Transcript, June 11, 1975, p. 11.]

Defendant contends that these records should have been produced for his defense at trial.

At trial, Lemler testified that he operated on a total refund basis and that he kept extensive records of his business. Many of Lemler's records were seized by investigators from the Office of the Attorney General of the State of New York. Thereafter, certain of these documents, but apparently not all, were made available for the prosecution of Lemler by state authorities in Nassau County. Lemler's records were kept in warehouse storage by the Attorney General of New York State. There is no basis for inferring that Lemler had the record of refunds in his possession during his custody as a state prisoner. Nor is there any basis for inferring that federal authorities were in possession of or knew the contents of these records, whose relevance to the case against Sangemino is unknown and appears dubious at best.

Defendant next contends that the Government breached its obligations of disclosure by failing to produce ten letters that Lemler wrote to the Federal Bureau of Investigation while he was incarcerated prior to his trial on state charges. In the DiGilio hearing, Lemler testified that he had written ten letters to the Mineola, Long Island office of the F.B.I., and that he was visited by an F.B.I. agent shortly before Christmas 1972. Defendant

further contends that a Selective Service employee named Winckler received some communication from an F.B.I. Agent Shea in 1972 relating to some federal investigation of Lemler.

The Assistant United States Attorney has informed this Court that he first met Lemler and commenced work on this case on January 11, 1974. In preparation for the trial, the prosecutor, acting pursuant to requests of defense counsel and a direction of this Court, reviewed and caused to be reviewed, all F.B.I. files relating to Nathan Lemler.[1/] The Assistant United States Attorney represented that no letters or Agent's reports concerning the 1972 interview remain in Lemler's F.B.I. file.

At trial here, Lemler testified that, during his thirteen months of incarceration prior to trial, he wrote 6,000 letters. Whether Lemler's count is accurate or not, it is apparent that he is a prolific letter-writer, and we assume that he did write the letters in issue here. However, upon this record, there is no basis for drawing an inference that these unsolicited letters which did not relate to a then pending investigation were retained for over a year until the investigation of this case commenced. Likewise, there is no foundation for hypothesizing

that the United States Attorney or the F.B.I. had suppressed these documents. See Paroutian v. United States, 297 F.Supp. 137 (E.D.N.Y. 1968). Defense counsel has initiated an inquiry with the Department of Justice, pursuant to the Freedom of Information Act; our findings here are not to be taken as conclusive or binding upon the Department in fulfilling its statutory obligations.

Defendant's next contention is that the Government withheld information relevant to this case that came to the Government's attention in 1973 when Lemler was acting as an informant with the Bureau of Narcotics and Dangerous Drugs. At the hearing in New Jersey, Lemler testified that in 1973 he told a Mr. Jeff Shalott, a Supervisor with the BNDD, and his staff, the entire story that he subsequently told to the Assistant United States Attorney. On cross-examination at the trial of Sangemino, Lemler admitted that he acted as an informant for the BNDD while he was on bail pending disposition of the state charges against him; and, in that capacity, he was reimbursed for certain expenses in an amount not exceeding $500.00. This testimony was consistent with that which he later gave in New Jersey. Again, defendant assumes without foundation that conversations between Lemler and

law enforcement authorities relevant to the charges against Sargemino were either memorialized in agency records or somehow were transmitted to the prosecutor and withheld here. These conversations occurred prior to the commencement of this investigation. The law enforcement authorities, whose knowledge of Lemler's bribery in connection with Selective Service deferments defense counsel would have attributed to the United States Attorney, were officers charged with enforcing the narcotics laws. Although it is conceivable that a BNDD agent may have included Lemler's story in some report even though its relevance to a narcotics investigation is dubious, there is no proof that such a document exists, or was culpably withheld. It is apparent that Lemler's allegations of bribery and conspiracy did not come to the attention of the United States Attorney for this District until January 1974 when Lemler initiated contact with that office. Again, defendant fails to demonstrate that a statement or exculpatory information existed and that it was withheld in violation of the prosecutor's obligation to disclose.

Heretofore, the Court has considered the New Jersey testimony only for purposes of evaluating the Government's compliance with its duties of disclosure. Defendant has failed to

demonstrate that the Government was remiss in meeting what obligations it had of disclosing information and materials that were in its possession. Treating the New Jersey testimony as newly discovered evidence, the Court finds that this evidence, such as it is, does not warrant the granting of a new trial.

> "The general standard governing motions for a new trial on the ground of newly discovered evidence is that the evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative or impeaching, and of such a character that it would probably produce a different verdict in the event of retrial." United States v. Marquez, 363 F.Supp. 802 (S.D.N.Y. 1973), aff'd. on opinion below, 490 F.2d 1383 (2d Cir.), cert. denied 419 U.S. 826 (1974).

The evidence gleaned from the examination of Lemler in the DiGilio hearing would at best have been of value only for the further impeachment of Lemler. As such, it would have been cumulative. Speculating, as we are required to do, as to what effect this evidence would have had on the jury, it cannot be said that there is a significant chance that this additional evidence would have dealt Lemler's testimony and the other evidence in the case such a knock-out blow as to produce a different result.

At the hearing in New Jersey, Lemler testified that he had committed bribery in several states but not in New York. At Sangemino's trial, Lemler had testified to giving a $1,000.00 bribe to a dean at St. John's University. Since the testimony here was more damaging to Lemler's credibility, we assume that this inconsistency is being propounded as a recantation of his testimony here. This newly discovered evidence, if indeed it is a recantation, could only further impeach Lemler's credibility and to that extent was cumulative and not material to the issues of Sangemino's guilt of the crimes charged. See, United States v. Trapn 11, 495 F.2d 22 (2d Cir.), cert. denied 419 U.S. 851 (1974).

Defendant's final contention is that a new trial is required because it has been demonstrated that Lemler has testified in such an incredible fashion at this trial and in New Jersey that a verdict should not be permitted to stand on such tainted testimony. More specifically, counsel relies upon certain statements made by Judge Meanor in his findings in the United States v. DiGilio hearing. There, Judge Meanor, sitting as the trier of fact, determined that Lemler was unworthy of belief, stating, among other reasons, that:

> "Lemler, for want of a better description, is a flim-flam man. He's about as trustworthy as a fox in a chickenhouse." [DiGilio transcript of Findings, p. 62.]

Judge Meanor further concluded:

> "I'm afraid for the Government I can attach little or no credibility to Mr. Lemler's testimony. I think Mr. Lemler is prevaricating. He's prevaricating about Mr. DiGilio just as he has prevaricated everything else in his life...." [Id., p. 68.]

Prior to the instant trial, defense counsel discussed the possibility of calling Nassau County Court Judge Henderson Morrison as a defense witness. Judge Morrison, at the time of sentencing Lemler, referred to him as a "pathological liar," although this does not appear to have been a justiciable issue in that criminal prosecution. See Transcript, February 14, 1975, pp. 17-18; Affidavit in Opposition, filed March 17, 1975, Exhibit 3. In that discussion, the court stated that this might be an objectionable area of inquiry since it is the province of the jury to assess the credibility of the testimony presented to it. Likewise, Judge Meanor's assessment of the veracity of Lemler, measured by the testimony which he heard, is of limited significance. The

jury in this case, hearing different testimony focused upon different issues and having corroboration of significant portions of Lemler's testimony, could certainly conclude that Lemler's testimony was worthy of their belief or that the independent evidence constituted proof beyond a reasonable doubt.

Defendant contends that this Court must find that Lemler was unworthy of belief as a matter of law, relying without elaboration on Mesarosh v. United States, 352 U.S. 1 (1956). Defense counsel's reliance on Mesarosh and its relevance to the evidence recently discovered through the testimony in the DiGilio case suggest either of two arguments. First, defense counsel's contention may be that Lemler was lying and that this tale of having counselled a fellow prisoner to avoid prosecution while he was allegedly cooperating with the Government was so bizarre in and of itself as to be indicative of an organic or psychiatric disorder. Alternatively, defense counsel may be contending that if Lemler's tale is true, then Lemler's trustworthiness was so low that, as a matter of law, this Court must treat his testimony as a nullity, and bearing in mind the prejudicial effect which it may have had on the jury, this Court must grant defendant a new trial. Neither formulation is persuasive.

Defendant has adduced no proof that the substance of Lemler's testimony was perjured. The jury heard an extensive account of Lemler's poor character. This Court would not lightly substitute its own assessment of a witness' credibility for the assessment made by the jury; similarly, we decline to substitute the determination of Judges Meanor and Morrison for the jury's determination, particularly since those judges did not hear Lemler's testimony and the other evidence in this case. Although Lemler hardly stands as the paragon of virtue, his testimony against Sangemino was corroborated in substantial measure. There is no basis upon which this Court could find, as a matter of law, that Lemler was an incompetent witness in that he was incapable of telling the truth. The jury could reasonably conclude on the basis of Lemler's testimony and all that they saw or heard during the trial that the Government had proven Sangemino's guilt beyond a reasonable doubt.

Defendant's motion for a new trial, pursuant to Rule 33, F.R.Crim.P., is denied.

So Ordered.

Dated: New York, New York
November 26, 1975

CHARLES L. BRIEANT, JR.

CHARLES L. BRIEANT, JR.
U. S. D. J.

F O O T N O T E

1. In a letter to defendant's trial counsel dated April 1, 1975, a copy of which was sent to the Court, the Assistant United States Attorney stated that he had personally reviewed the F.B.I. files pertaining to Nathan Lemler. The prosecutor checked the F.B.I. files again during the course of the trial in arriving at the stipulation that, if an F.B.I. Agent were called as a witness, he would testify that an F.B.I. investigation in conjunction with Rome police revealed that Nathan Lemler never attended classes at the University of Rome.

# STIPULATION

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| -against- | : | STIPULATION |
| WILLIAM SANGEMINO, | : | 74 CR 928<br>75 CR 127 |
| Defendant. | : | |

It is Hereby Stipulated by and between the parties hereto, through their counsel of record, that the following list of documents and exhibits presented to this Court at a hearing, November 10, 1975, be transmitted and included in the record on appeal.

| | TITLE | DEFENDANT'S EXHIBITS: |
|---|---|---|
| 1. | Transcript of the Competency Hearing of: | A-June 6, 1975, pp 1-54<br>B-June 11, 1975, pp 2-205 |
| | UNITED STATES OF AMERICA, | C-June 13, 1975 pp 3-149 |
| | VS. | D- pp 52-82 |
| | JOHN DiGILIO, JOHN GRILLO, HARRY LUPO, PETER SZWANDRAK, GEORGE KUCZNSKY AND IRENE (KLIMANSKY) KUCZYNSKI, | Criminal No. 74-314 |
| | Defendants. | |
| | IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY. | Newark, New Jersey |

2. Transcript of the minutes of the hearing on Defendant's Motion for a New Trial:
UNITED STATES OF AMERICA vs. WILLIAM SANGEMINO, 74 CR 928
75 CR 127

argued before Hon. Charles L. Brieant, Jr., District Judge, in the UNITED STATES COURT FOR THE SOUTHERN DISTRICT OF NEW YORK on November 10, 1975.

ATTORNEY FOR GOVERNMENT

MICHAEL B. POLLACK,
ATTORNEY FOR DEFENDANT

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff- Appellee.

- against -

WILLIAM SANGEMINO,
Defendant- Appellant.

*Index No.*

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

*I.* James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 West 146th Street, New York, New York

*That on the* 22th *day of* March *19*76 *at* One St. Andrews Plaza, New York, New York

*deponent served the annexed* Appendix Brief Vol I & II *upon* Robert J. Fiske Jr., US Attorney for the Southern District

*the* Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

*Sworn to before me, this* 22th *day of* March *19*76

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUB. C. State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977